UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

FIRST STUDENT

and Case No. 34-CA-12705

AFSCME, LOCAL 1303-416 OF
COUNCIL 4, AFL-CIO

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DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. Based upon a charge and amended charge filed on May 26 and July 27, 2010[1] by AFSCME Local 1303-416 of Council 4, AFL-CIO (the Union), a complaint and notice of hearing (the complaint) issued on August 31 alleging that First Student, Inc. (the Employer or Respondent) violated Section 8(a)(1) and (3) of the Act by suspending and discharging its employee Janet Merriss because she engaged in concerted, protected and Union activities and that Respondent violated Section 8(a)(1) of the Act by maintaining overly broad rules prohibiting Section 7 activity and by enforcing such rules against Merriss. Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as will be discussed below. This matter was tried before me on December 7 in Hartford, Connecticut.

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the Acting General Counsel [3] and the Respondent, I make the following

[1] All dates are in 2010 unless otherwise indicated.

[2] Credibility resolutions, a number of which will be discussed in further detail below, have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences drawn from the record as a whole have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony of others or because it was inherently incredible or unworthy of belief.

[3] Hereafter referred to as the General Counsel.

Findings of Fact

I. Jurisdiction

Respondent is a Florida corporation, with headquarters located in Cincinnati, Ohio, which maintains a facility located in Weston, Connecticut, referred to as its Weston facility, where it is engaged in providing bus transportation services. Respondent has admitted that during the 12-month period ending July 31, in conducting its operations, Respondent derived gross revenues in excess of $250,000 and performed services valued in excess of $ 50,000 in states other than the State of Connecticut. Based upon these admissions and the record as a whole I find that Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

Based upon the record as a whole, I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

1. Overview of Operations

Respondent provides school bus transportation services for the town of Weston, Connecticut pursuant to a contract with the Town of Weston Board of Education (the Board of Education)[4] referred to as the "Revenue Contract." Vincent Cappiello is Respondent's district manager for lower Fairfield County, which includes the town of Weston. He has worked in the industry for approximately 25 years. Chuck Crouse is Respondent's contract manager and is directly responsible for the Weston operations. He has been employed in various positions for First Student for 20 years.

Jerome Belair is Weston's superintendent of schools. Jo-Ann Keating is the director of finance and operations for the Board of Education and is responsible for school transportation. Reporting directly to her is David Lustberg, who has been the transportation coordinator for the Board of Education since the spring of 2009. This was a newly-created position filled by Lustberg, who has also served as the girls' softball coach for about 7 years. As transportation coordinator, Lustberg has an active role in overseeing the Weston transportation operation. He is at the bus yard daily, frequently interacts with First Student drivers and managers (in particular, Crouse) and oversees the dismissal operations. Cappiello testified that Crouse is expected to defer to Lustberg and, by extension, to the preferences and direction of the Board of Education.

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[4] Section 2(2) of the National Labor Relations Act exempts government entities or wholly owned government corporations from its coverage. Following the test described by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County, Tenn*., 402 U.S. 600 (1971), the Board has determined that entities are political subdivisions exempt from NLRB jurisdiction, if they are "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." Thus, it is not disputed that the Town of Weston and its public schools are exempt entities under Section 2(2) of the Act. Moreover, the General Counsel has not alleged that the Board of Education is a joint employer with First Student.

The Employer's facility is located at 3 School Road in Weston, and is adjacent to the Hurlbutt Elementary School. There are parking areas for buses and employees as well as an office for Crouse and dispatcher Marilyn Dietzman. There is also a drivers' room where a Union bulletin board is located. There are approximately 23 drivers on the Weston contract, who are represented by the Union.[5]

Janet Merriss has been employed as a Weston school bus driver for about 14 years. She has been shop steward and has also held the position of Union president at various times, most recently for the last two years. At the time of the events at issue, the other local Union officers were Valient Domingue, who served as vice-president and Yvonne Ehrismann, the secretary/treasurer.

When First Student assumed operations from Laidlaw, the Employer assumed the extant collective-bargaining agreement which was effective as of July 1, 2005.

2. First Student's "Freedom of Association" Policy

First Student maintains a "Freedom of Association" policy which is set forth in its National Employee Handbook and provides, in relevant part, as follows:

> Management shall not act in any way which is or could reasonably be perceived to be anti-union. This includes refraining from making decisions, comments about unions, publishing or posting pamphlets, fliers, letters, posters or other communications which should be interpreted as criticism of the Union or advises employees to vote "no" against the Union.[6]

3. Relevant Provisions of the Revenue Contract

Paragraph 30 of the Revenue Contract between the Employer and the Board of Education provides as follows:

> The CONTRACTOR will be responsible to supply charter and field trip buses given 3 days notice. The CONTRACTOR shall provide transportation to and from interscholastic athletic events and special field trips. The CONTRACTOR may use the spare buses to provide athletic and field trip transportation, during the hours of regularly scheduled transportation runs.
>
> In the event the CONTRACTOR is unable to provide transportation for particular trips, it shall arrange substitute transportation approved by the school administration. The BOARD may, at its discretion, engage other contractors to provide transportation for particular athletic events and field trips. The price for all such trips provided by the CONTRACTOR shall be identified in the Appendix of this contract.

Paragraph 25 of the Revenue Contract contains the following provision regarding the removal of drivers:

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[5] The Union has represented the school bus drivers working in Weston since about 1983, through a variety of contract providers. Respondent became the contract provider for the Weston operations in about 2008, when it took over the operations of Laidlaw Transit, Inc.

[6] This policy is posted at the Weston site. As Respondent points out, former Board Chairman William Gould has been appointed to monitor this policy.

> The conduct of all operators is the responsibility of the CONTRACTOR. The CONTRACTOR shall immediately discipline or discontinue the use of an operator in the performance of this contract when the BOARD, its representatives or agents notifies the CONTRACTOR that an operator's performance is unsatisfactory for any reason. The CONTRACTOR shall immediately suspend an operator from all duties under this Agreement when the Board, its representatives or agents, determines that an operator's performance is unsatisfactory and directs that the operator be suspended for any reason.

The record reflects that this is not a unique provision and, from time to time, various nearby Connecticut school districts have made written requests for the removal of First Student drivers.[7] In addition, Keating offered testimony regarding similar requests made by the Weston school district. As Keating testified, she requested that one driver be removed due to repeated complaints by a parent of an overly harsh attitude, confrontations with that parent and an incident where the driver told a middle-school student that she was dressed inappropriately. On another occasion, a driver was removed due to a complaint that he placed his hands around a student's neck, as if to choke the student. In this particular instance, however, Keating could not recall whether the removal was pursuant to a request from the Board of Education, or if First Student determined to remove the driver of its own volition. Another driver was removed at the request of the Board of Education for several incidents of yelling at children, a confrontation with a parent and one incident where he grabbed a child by the arm. On yet another occasion Keating requested that a driver be retrained because he sped by a bus stop while a parent was standing there.

As the General Counsel has noted, the Revenue Contract additionally contains the following provisions:

- The CONTRACTOR shall not be liable for failure to perform any provision or term of this agreement if such failure to perform is caused by an Act of God, public enemies, authority of law, quarantine, perils of navigation, riots, legal strikes or hazards and dangers evident to a state of war. (par. 28(c))

- All unlawful provisions shall be deemed stricken from this Agreement and shall not affect the continuing validity of the remainder of this Agreement (par. 42)

In addition, paragraph 46 of the Revenue Contract provides that any disputes arising in connection with the Agreement shall be referred to the American Arbitration Association in

[7] For example, on May 25, 2005, Cappiello received a request from the Stamford school district to remove a driver because he (1) refused to transport a student; (2) got into a verbal confrontation with that student's parent; (3) had a history of making off-color comments and (4) a history of prior problems on another route. In March 2007, September 2006, March 2007, December 2007, September 2008, the Wilton schools requested that various drivers be removed for unspecified reasons. In November 2009, the Brookfield school district requested the removal of a driver for "plac[ing] a number of Brookfield High students in a very dangerous and unsafe position." In September 2010, the Easton school district requested the removal of a driver for failing to notice a sleeping child during two separate checks of the bus. In November 2009, the Fairfield schools requested the removal of a driver for a failure to follow her assigned runs, lateness and parental complaints. In November 2009, the Fairfield school district requested that two drivers be removed pending evidence that they underwent retraining due to questions about their ability to safely drive a school bus. The Fairfield school district requested the removal of another driver in October 2009 due to his failure to follow the assigned route.

accordance with its rules governing voluntary arbitration.

4. Relevant Provisions of the Collective-Bargaining Agreement

Certain provisions of the Revenue Contract have been incorporated by reference into the collective-bargaining agreement between the Union and First Student. In particular, Section 16.4, entitled "Revenue Contract to Prevail" provides as follows:

> The relevant provisions of any revenue contract between the Company and its customers under which an employee of the Company performs work shall be incorporated by reference into this Agreement, to the extent only that such provisions impose terms, conditions or requirements upon the Company and/or its employees that are not otherwise required under the terms of this Agreement. In a situation in which a provision of this Agreement is in conflict with any of the provisions of any such revenue contract, the relevant provisions of said contract should prevail for all purposes. Nothing in this Section shall be construed as subjecting any of the terms of any of the Company's revenue contracts to the Grievance and Arbitration provisions of this Agreement.

Moreover, Section 5.0, which sets forth the basis upon which employees may be discharged without prior warning includes the following:

> Receipt by the Company from a contracted customer of a notice to remove an employee from performing service under that contract.[8]

5. Respondent's "Prevention of Workplace Violence" Rule

At page 38 of the National Employee Handbook, a document which is distributed to all First Student employees, is a section entitled "Company Rules and Personal Conduct." Among its provisions is a section (Section B) entitled "Prevention of Workplace Violence." It is undisputed that at all relevant times, Respondent has maintained, and continues to maintain the following rule:

> At FIRST STUDENT, a safe work environment is fundamental to the success of our employees and our company. Each FIRST STUDENT employee has the right to expect that his/her workplace is free from intimidating, threatening or dangerous behaviors and practices. Therefore, FIRST STUDENT will not tolerate the following actions against employees, customers, vendors, contractors, as well as the general public:
>
> - Violent behavior
> - Threats of violence

[8] The others include involvement in a preventable traffic accident where someone is injured; conviction arising out of the operation of a motor vehicle which involves alcohol and drugs; failure to obey the instruction of a public safety official while on company time or property; violation of a safety rule or practice which results in injury; possession or use of alcohol or unapproved drugs on company time and property; violation of the company drug and alcohol policy; refusal to submit to a physical examination or a drug and alcohol screen; fighting or threatening, intimidating or coercing anyone on company time or property; insubordination; damaging, destroying or defacing the property of the company or that of another employee; engaging in any form of employment or self-employment while on a leave of absence, dishonesty or other just cause.

- Harassment, physical or verbal
- Intimidation
- Any conduct that creates an intimidating or otherwise offensive work environment
- Other prohibited conduct described below

The following are examples of conduct that, if committed in person, in writing, by electronic mail or by any other means is prohibited:

- Direct, indirect, or implied threats toward persons or property
- Vulgar, profane, or offensive language toward others
- Disparaging or derogatory comments or slurs
- Offensive sexual flirtations or propositions
- Verbal intimidation or bullying
- Exaggerated criticism, name calling or belittling behavior
- Hitting, striking, pushing, kicking or holding
- Impeding or blocking movement of another person or urging others to do the same
- Using, threatening, or implying the use of any weapon or object that could be used as a weapon
- Derogatory or offensive posters, cartoons, drawings or publications

B. Events Leading to Merriss' Grievance Investigation

At the beginning of the 2009-2010 school year, First Student drivers observed that the Board of Education had purchased three Suburban vans, and questions were raised about the uses to which these vans would be put. Prior to this time, First Student drivers had the opportunity to bid on a trip called the "Carluzzis run," a mid-day assignment which involved taking special education students to and from a supermarket in a neighboring town where they would purchase groceries for use in their classes. As of the fall of 2009, the First Student drivers were no longer given the option of bidding on this trip, and dispatcher Dietzman informed employees that the Board of Education would be using the newly-purchased vans for transporting the special education students. Ehrismann, Domingue and Merriss then spoke with Crouse about whether the vans were going to be used for school transportation services generally and Crouse responded that the vans were used for transporting special education students. At this point in time, apart from the aforementioned Carluzzis run, the transportation of special education students had not been work traditionally performed by First Student drivers.[9]

The local Union officials thereafter became aware that the Carluzzis run was being driven by a First Student driver named Ed Smith who had been hired by Board of Education Transportation Coordinator Lustberg. Due to Smith's low seniority, he was generally unable to bid on First Student routes which involved mid-day driving (such as the kindergarten runs) and was therefore available to work independently for the Board of Education during his off hours.[10] When the Union officials addressed this matter with Crouse, he stated that the Board had taken

[9] Section 26 of the Revenue Contract provides that: "The BOARD may arrange, without being barred by the terms of this agreement, the transportation of students with special needs or who are designated as special education students by the BOARD or school administration for out of district programs if doing so is in the best interests of the BOARD."

[10] Smith acknowledged that he knew that the Carluzzis run had previously been posted for bid and that he typically would not have received it due to his low seniority. According to Smith, at the beginning of the 2009-2010 school year, Lustberg approached him and stated that he was looking for drivers without kindergarten runs, as he did not want to pull any drivers from their work assignments.

over the Carluzzis run and they had the right to do so.[11] Crouse testified that he was aware the Union was concerned about the use of the vans but that he told the Union officials that there was really nothing he could do about it; and that work other than home to school transportation was not guaranteed.[12]

Lustberg testified that since November 2009 he has used the vans to transport special education students who reside in the Town of Weston to schools located outside of Weston. In addition, during the spring of 2010 he began using the vans for transporting small team groups to athletic events. During that semester, he used the vans for three golf team trips and two girls' softball team trips. As Lustberg was the girls' softball team coach, he drove one van himself and hired Smith to drive a second van to transport the team.

On Monday, April 26, Lustberg asked the athletic department secretary, who is responsible for arranging transportation for the teams, if she had booked transportation for a girls' softball game scheduled to take place the following Friday (April 30) at 7:00 pm. At that time, the trip had already been posted for bid by First Student and had been awarded to driver Gene D'Or.[13] Lustberg calculated that if First Student did the trip it would cost the Board of Education $150 and that if he used the vans, which were available, the total cost of the trip would be about $80. Lustberg decided that he would use the vans to transport the team and instructed the secretary to cancel the booking with First Student.

The girls' varsity softball team also had a game scheduled for the evening of April 29, which had been bid upon and awarded to Ehrismann. She was making the return trip when she overheard Lustberg announce to the team that on the following evening the team would be going to game in the vans, and that they should meet at Hurlbutt Elementary school, rather than at the high school as was customary. Ehrismann questioned Lustberg about what she had heard, and he advised her that he would be using the vans to transport the team to the game on the following evening.

Upon arriving home, Ehrismann composed an e-mail summarizing the substance of what she had learned that evening and sent it to Merriss, Domingue and International representative Terri Paventi and also requested that it be forwarded to International Union representative Wayne Myers. The next morning the three local Union officials decided to discuss the matter with Dietzman.

Dietzman informed the Union officials that Lustberg had come into her office the prior day and advised her that the trip had been cancelled. The drivers disputed this account, stating that the trip had not in fact been cancelled, and that Lustberg was performing the work himself using the vans. The employees argued that the trip belonged to D'Or. Dietzman responded that the Board of Education had the right to do what they wanted and could cancel the trip. Merriss

[11] The local officials were advised by the International Union representatives not to file a grievance over this issue.

[12] Smith testified that he and Merriss had discussed the fact that he "moonlighted" for the Board of Education. Merriss had told him that she did not think it was fair that the Carluzzis run was being operated by someone so low on the seniority list. Smith testified that he explained to Merriss that it was not a First Student issue. Later that afternoon, he asked Crouse if Merriss could do anything to take that run away from him and Crouse replied that it was not a First Student issue, and that there was nothing Merriss could do.

[13] Under Article VIII of the parties' collective-bargaining agreement extra driving work including field trips and after-practice trips is to be offered to all regular drivers on the basis of rotational seniority. The trip sheet filled out by Dietzman at the time of the bid shows that it had been awarded to D'Or.

obtained a copy of the trip sheet that Dietzman had completed at the time the bidding had taken place, and it contained a notation showing that that the trip had been cancelled. By this time other drivers, including D'Or, had arrived at the dispatcher's office for the weekly bidding process (called "trip picks") and were upset that the work had been transferred away from First Student. The local Union officials informed their coworkers that they would be filing a grievance over the issue.

Merriss concluded that in order to file a proper grievance and submit a claim for compensation for D'Or, she would need information about who was driving for the Board of Education and how long the trip would last. She decided to conduct the investigation herself, and asked Ehrismann to accompany her. Due to a prior commitment, Ehrismann could not do so, and Merriss undertook the investigation on her own.

C. The April 30 Grievance Investigation

On that Friday, at about 4:30 p.m., Smith, who had been hired by Lustberg to drive the second van, went to the Hurlbutt Elementary School parking lot to wait for the girls' softball team and Lustberg to arrive. The parking lot was relatively empty and Smith sat in his car. At about 4:45 p.m., Merriss pulled in and parked directly behind Smith. He called Lustberg and informed him about Merriss' presence. Lustberg told Smith to remain in his vehicle. Lustberg, who was already en route, arrived shortly thereafter. Both Lustberg and Smith observed Merriss taking photographs.

There are various accounts of what else occurred at this time including those contained in police reports filed by Smith and Lustberg, a subsequent statement provided by Smith to First Student and testimony, as adduced at hearing, through Merriss, Smith, Lustberg and Keating, all of which will be addressed below. However, it is undisputed after he arrived at the Hurlbutt parking lot, Lustberg called Keating, who instructed him to call the police. As the police were arriving on the scene, Merriss left the Hurlbutt lot, but drove to the adjacent drivers' parking lot. [14] The police officers spoke with both Lustberg and Merriss, but took no further action.

D. The May 3 Posting on the Union Bulletin Board

On Monday, May 3, Merriss posted material relating to the events of the prior Friday evening on the Union bulletin board located in the driver's room at the First Student office.

According to Merriss, she placed the six pictures she had taken the previous Friday on a poster board. The pictures posted by Merriss, in the order in which they were taken, consist of: a photograph of the rear of Smith's car, two pictures of Lustberg with sporting equipment near the two vans, a close up of Lustberg standing near the vans, a picture of Lustberg, phone in hand, standing at the driver's side of Smith's car and a picture of Lustberg speaking to a police officer with Smith standing nearby. Underneath this poster, Merriss wrote the following:

> ATTENTION DRIVERS
> Friday, April 30 5:00 pm, to 9:45 pm
> Here a photo of Eddie Waiting to do the Newtown V Softball trip that was taken away from Gene D'Or. By Dave Lustberg.

[14] There are three parking lots adjacent to each other. One is the Hurlbutt Elementary School lot (the Hurlbutt lot). Down a small hill is the bus yard lot (the bus yard lot). Also downhill is the lot where the bus drivers park their own vehicles (the bus drivers' lot).

Sneaky Underhanded and Illegal!

Merriss had also written a description of the events of that evening for her own reference and upon arrival at work that morning had given it to her fellow Union officers. Although Merriss stated that she did not personally post that written account, it is undisputed that it was, in fact, posted on the Union bulletin board beneath the material Merriss had initially placed there. Merriss' description, as it appeared on the Union board, is as follows:

> April 30, 5:00 pm
>
> As a follow up to Yvonne's conversation on Thursday April 29 with Dave Lustberg, Town Transportation Director, I decided to find out who Dave was paying to drive the second town owned Suburban, with his team, the girls Varsity Softball Team to Newtown High School for a meet Friday night, pick-up time, 5:30. It came as no surprise when I saw and photographed Ed Smith, a Weston Union Driver, surreptitiously park in the Hurlbutt front lot, by the Suburbans and wait for Dave. Dave showed up around 5 and started to load one of the two cars for the trip, (he was driving the other Suburban.) I took photos of Dave and Ed in his car waiting. Dave suddenly noticed me, I was about 20 feet away, panicked and called someone on his cell phone immediately. (Joanne Keating?) Then I heard Dave say to the "Comm Center," "There is a bus driver here at Hurlbutt taking pictures of the team, me and the other bus driver. I'm not comfortable with this, send some officers over now." Two officers arrived, Dave wasted no time rushing down to point me out (I was in the drivers lot in my car) and try to get me arrested? I don't know. I explained to the officers what I was doing and they said it was a Union matter and did not involve them, and went to explain that to Dave. He and Ed left 15 minutes before the assigned time (5:30). Just after the officers left the bus yard, Dave came screaming down at me, "why are you harassing the boy? Why don't you let him make a decent living." At 9:00 pm Yvonne and I returned to the Hurlbutt front parking lot and waited for the team return. They came back at 9:30 pm. This would have been a (4:30 to 9:45) 6.25 hour charter for Gene D'Or, the rightful driver of this charter. We feel that F/S and the B of E both owe it to Gene D'Or to pay him for the lost charter. F/S has a contract with the Board of Ed in Weston. They BOTH have to adhere to the conditions and regulations stipulated in the contract. See page 3 of FAX. I also want to file a Greivance against F/S for allowing Dave to use Ed Smith as an outside driver, when the Contract clearly states that the B of E can use an outside contractor, i.e. Dattco etc. ONLY if F/S cannot provide transportation for the charter (Ed is NOT an outside Contractor, only a Weston bus driver.) This is a clear attempt by Dave Lustberg to undermine the Union Program and Charter/Trip process at the bus garage under the guise of "saving the town money." This does not even address the issue of SAFETY during team transportation to and from different venues. That is another serious issue that needs to be addressed. Janet Merriss. Union President.

Ehrismann, who was present at the time Merriss posted the materials on the Union bulletin board testified that about 4 or 6 drivers were present in the room, and Merriss advised them that she was going to file a grievance over the issue. According to Ehrismann, there was no heated discussion at the time. Ehrismann performed her runs that morning and returned to the drivers' room at about 8:30 am. Drivers were coming in and out, but there was no gathering of any sort.

As Merriss was posting the material that morning, drivers were coming and going, checking in, getting their keys and going to perform pre-trip inspections of their vehicles. She

too had to conduct preliminary preparations for her run and get out on the road. Other than the drivers, only dispatcher Dietzman was present at the time. Merriss did her high-school and middle-school run and returned to the office for a short break at about 7:10 a.m. She went to the driver's room and found that the poster was still up. No other driver was present except for Ehrismann. At 7:40 Merriss went out to do her elementary school run and returned at about 8:30. Then she, Ehrismann and Domingue met with Crouse and Dietzman and stated that they thought that there had been an infraction of the contract, that the trip had been legitimately bid to D'Or, and had not been cancelled but had been clandestinely given away. They told Crouse that the Union planned to file a grievance about it. Crouse told them to go ahead, but that the Board of Education is the customer and they can do what they want.

After the meeting, the drivers returned to the drivers' room. Although the poster was still up, the pictures of Smith had been removed. Merriss asked Dietzman about it and Dietzman replied that Smith had removed the pictures. At this point, Merriss removed the poster and other material from the Union bulletin board.

Smith testified that on Monday morning he received a telephone call from Dietzman who told him that she thought it would be a smart idea for him to avoid going into the office, and that he should proceed directly to his bus for his morning run. According to Smith, Dietzman told him that it was a very hostile place right now and explained that there were pictures of Smith posted in the office. As Smith acknowledged on cross-examination, he was not late for his run on that day. After Smith completed his morning assignment he went to the office and observed the pictures, which upset him.

Lustberg testified that on Monday morning he received a telephone call from Deanna Rivera, another First Student driver whom he had hired to drive for the Board of Education. According to Lustberg, Rivera told him that Merriss was rallying the drivers against Smith. Lustberg went into his office, and subsequently received a telephone call from Dietzman after which he proceeded to the bus garage and saw the poster. Lustberg testified that he was very upset about being characterized as sneaky, underhanded and illegal and felt that it was not true. Lustberg pointed out that he had made the announcement about the vans in front of Ehrismann and was only trying to save the athletic department some money. According to Keating, Lustberg called her about the posting and she went to see it. She arrived at the facility sometime after 8:00 a.m. She spoke with Crouse and was informed that Merriss had posted the material.

E. Smith and Lustberg File Police Reports

On Monday, May 3, after viewing the posting on the Union bulletin board, both Smith and Lustberg went to the Weston Town Police and filed statements relating to Merriss' conduct on the evening of April 30. In particular, Smith filed the following report:[15]

> I was doing a Sports Charter for the board of Education/Dave Lustberg I parked my car at Hurlbutt Elementary parking lot. I noticed that Janet Merris was sitting in her car taking pictures of me and Dave Lustberg. Dave felt uncomfortable and he called Joann Keating she advised him to call the cops. When dave called the cops Janet pulled off went on the side of me and called me a fucking scum bag and to keep taking money from other drivers. Then she left. When she noticed the cops she turned around to talk to them and the told her that she had to leave cause what she was doing is a union issue. I was

[15] The statements of Smith and Lustberg are reproduced as they appear in the original documents.

warned by my dispatcher to not come into the office due to all the problems Janet was causing so I lost an hour of pay.

On May 3, Lustberg provided the following statement to the Weston police:

I am Transportation Coordinator, Weston Public Scl. At or about 5 p.m. (15 minutes) on Fri, 4/30/10, Janet Merriss was on property at Hurlbutt Elem. School taking pictures of me, school board vehicles, school board driver Edward Smith and possibly Weston High School students. Mrs. Merriss also verbally attacked and harassed Mr. Smith in front of me and the high school students. Thereafter, I called the police and officer arrived and asked Mrs. Merriss to leave. After I returned to Hurlbutt in the school vehicles at 9:30 p.m., Mrs. Merriss and Yvonne Ehrismann were hiding in the parking lot watching our return with the high school students. I feared for my safety, the students and that of my car which was in the lot the entire time I was away. Following this, on Monday, 5/3/10, Mrs. Merriss posted pictures of me and the school vehicles on the wall in the bus garage along with slanderous and inflammatory statements which I have provided to WPD.

F. Testimony adduced at hearing about the events of April 30

1. Merriss

According to Merriss, she finished work at about 4:30 p.m. and drove over to the Hurlbutt parking lot. She recognized Smith's car, parked directly behind him, took a picture of his car and sat and waited. Lustberg arrived at about 5:00 p.m., parked his car and began loading sports equipment into the vans which were located to the left and across the entrance driveway to the lot. At this point, Merriss took pictures of Lustberg and the Suburbans. Lustberg went over to Smith, instructed him to remain in his car and placed a call on his cell phone. He then walked in the direction of Merriss' car and she overheard him call the police and advise them that there was a driver in the parking lot who was taking pictures of the girls' softball team and that he (Lustberg) was uncomfortable. Lustberg requested that the police send officers to the site.

Merriss testified that at the time she was taking pictures, no students were present but that they began to arrive shortly after Lustberg called the police. Merriss stated that she did not want to involve the students, so she drove into the bus drivers' lot, which is located down the hill from the elementary school lot, but situated herself in a location where she could continue to observe the vans in the Hurlbutt lot.

Shortly after Merriss left the Hurlbutt parking lot, two police officers arrived in separate vehicles. One drove past Merriss and parked in the bus yard lot which, like the bus drivers' parking lot, is located down the hill from the Hurlbutt lot. Merriss followed this officer, passed his car and parked next to a dumpster. Another police officer pulled in from another direction and parked in the bus yard lot near Merriss.

Lustberg spoke with the officers, one of whom then went to speak to Merriss. She explained that she was not taking pictures of the team, but rather of Lustberg and the other driver to investigate a grievance for the removal of work which had been assigned to another driver. She showed the officer the pictures she had taken. According to Merriss, the officer told her it appeared to be a union issue. He said he would speak with Lustberg and walked away. Merriss then drove around the bus yard lot and returned to the bus drivers' lot in order to take additional pictures. Smith, at this time, was still in his car. She observed him leave his vehicle and approach the vans, and she took a picture of him to document the fact that he was the additional driver. The police then left the scene and Merriss began backing out of the drivers' lot

to leave as well. At his point, Lustberg, who had been standing in the access driveway to the bus drivers' parking lot, approached Merriss and shouted, "Why don't you give the kid a break. He wants to earn a decent living." According to Merriss, she did not respond. She then drove around the block and back through the parking lot area. By this time the vans had left.

Later that night, Merriss and Ehrismann returned to the Hurlbutt lot in order to observe what time the team returned from the trip, which was approximately 9:30 pm.

Merriss denied that she made specific comments which have been attributed to her by Respondent's witnesses (discussed above and in additional detail below) and further stated that she did not say anything whatsoever to either Lustberg or Smith during her investigation of the grievance. Merriss also denied taking pictures of the girls' softball team. The pictures which are in evidence do not contain images of students. In addition, Ehrismann testified that she has reviewed all the photographs taken by Merriss on that evening and that none of them include members of the girls' softball team.[16]

2. Smith

Smith testified that he is 24 years old and worked for First Student in Weston from March 2008 until August 2010. He has since been transferred to Fairfield. At the time of the events in question, Smith was aware that Merriss was the Union president. As noted above, in addition to working for First Student, Smith had been hired by Lustberg to drive for the Board of Education.

As regards his assignment to drive the girls' softball team on April 30, Smith testified that earlier in the week he had received a call from Lustberg offering him a trip driving the team to Newtown. Thus, on Friday afternoon after Smith completed his First Student runs, he drove over to the Hurlbutt parking lot, watched the freshman girls playing on an adjacent sports field and waited for Lustberg and the team to arrive. After a short while he saw Merriss arrive and park directly behind him. He called Lustberg who said that he would be there soon and directed Smith to stay in his car.

After Lustberg arrived, he came over to Smith and told him to remain inside his car. He then walked over to his vehicle, which was parked approximately two spaces away from Merriss. According to Smith, he then heard words being exchanged and, although he could not clearly hear exactly what was said, he heard Merriss direct some swear words toward Lustberg such as "asshole" and "fuck you." Smith also stated that he observed Merriss making these comments in his rearview mirror.

As all this was going on, the team started to arrive and they brought their equipment over to the vans, which were parked on the other side of the driveway entrance to the Hurlbutt lot.[17] When asked directly whether there were students present when Merriss was yelling swear words at Lustberg, Smith testified that there were a couple of girls present, not all of them. Smith then stated that a "good amount" of team members were in the perimeter of the vans, loading their gear into the vehicles at that time.

[16] Two of the pictures taken of Smith's vehicle contain images of girls playing on a sports field in the distance. As discussed below, Smith testified that when he arrived at the Hurlbutt lot freshman girls were playing on an adjacent sports field.

[17] According to Smith, some team members drove themselves and others were dropped off by their parents.

Smith saw Lustberg on the phone after his "exchange" with Merriss and was later informed that Keating had instructed Lustberg to call the police, who arrived shortly thereafter. As the police cars approached, Merriss began to pull out of the Hurlbutt lot. She paused at the stop line before proceeding out of the lot and was about 4 to 5 feet from Smith. According to Smith, Merriss then screamed out to him, "You're a fucking scum bag, you're stealing work from our fellow worker." Lustberg then ran over to Merriss and told her to leave his driver alone, and she pulled out of the lot and drove off. According to Smith, he did not speak with the police on this occasion. While Lustberg was speaking with the police, Smith assisted the team members load their gear into the vans.

Smith further testified that the only discussions he had with representatives of the Board of Education or First Student about the incident at the Hurlbutt parking lot were the discussions he had with Lustberg at the police station on May 3, and a subsequent discussion with Crouse. He did not offer specific testimony about what he discussed with either of them.

3. Lustberg

As Lustberg testified, he was in the process of driving to Hurlbutt when he received a call from Smith who informed him that Merriss was in the parking lot. He instructed Smith not to do anything and said he would be there in a minute. When Lustberg arrived the lot was "virtually empty." He saw Merriss sitting in her car with the window down and a camera in her hand. Lustberg walked over to Smith's car and told him to stay inside. He could see Merriss leaning out and heard her camera. He returned to his car, which he had parked in the same row as Merriss, two spaces over, and called Keating.

According to Lustberg, while he was on the phone with Keating he could hear Merriss yelling something from her car. He testified that he was not listening to her, so he did not know what she was saying. As Lustberg testified, as no one else was present Merriss, was either yelling to him or at him but he did not know what she was saying at that point in time.

Lustberg told Keating that Merriss was in the parking lot, taking pictures of him, Smith and the vans and Keating told him to call the police, explain the situation and request that she be removed.

After the police were called, Lustberg removed items from the trunk of his car and put them into one of the vans. Smith remained in his car. Lustberg noticed that Merriss was continuing to take photographs of him near the vans. At this point the team members began to arrive. Lustberg testified that he told the girls what was going on and instructed them to remain by the vans.

The police arrived and as one police vehicle entered School Road, Merriss pulled out of her parking spot, drove up to the driveway entrance and stopped her car parallel to Smith's. There was a grassy island between the vehicles. As Lustberg then testified, Merriss started screaming at Smith through the open passenger window of her vehicle. Some of the girls asked why Merriss was yelling at Smith, and he told them not to worry about it but to stay by the vans. Lustberg then ran to the grassy island between the vehicles and asked Merriss why she would not leave Smith alone, he is just trying to make a living. According to Lustberg, Merriss yelled out that Smith was a scab and then drove away. Smith did not offer any specific account of what Merriss may have been "screaming" at Smith and further failed to explain why he was unable to do so.

As Lustberg testified, Merriss then drove to the bus drivers' parking lot, facing the vans and took additional photographs. The police officer spoke first with Lustberg, then Merriss. He returned to Lustberg and told him that he had instructed Merriss to leave.

At the conclusion of the evening, at about 9:30 p.m., as the vans returned to Hurlbutt, Lustberg noticed Merriss' car in the corner of the parking lot. At this time he made no attempt to contact First Student due to the late hour.

Lustberg asserted that his concern with Merriss' presence stemmed from the fact that she did not belong on school property, with a camera. He denied knowing why Merriss was in the parking lot during the evening of April 30 and first stated that at the time he was unaware that she was the local Union president. He then amended this testimony to state that he didn't know whether he knew about Merriss' role with the Union at the time. Lustberg further claimed that Merriss was "absolutely" taking pictures of students at the time, and that she had her camera out while twelve students were standing around the vans. When asked what he reported to the police at the time of his phone call, Lustberg stated that he told them that Merriss was taking pictures and that he was uncomfortable, the student were uncomfortable and that Dr. Keating wanted her removal. When asked whether he had reported any confrontation to the police, Lustberg stated that he reported it when he went to the police station, but did not know whether he reported it to the officer on the scene that evening. Lustberg admitted that he was aware that a report prepared by the Weston police characterized the incident as an internal union issue between First Student, the Board of Education and the Union.

4. Keating

Keating testified that Lustberg called her at about 5:00 p.m. and told her that Merriss was in the parking lot where the vans were parked, that he had asked her what she was doing and she replied that she was taking pictures of the vehicles. According to Keating, Lustberg stated that Merriss was agitated and he sounded very concerned. When Keating was asked if she overheard anything in the background during this telephone call, and she replied that she could hear someone yelling back at Lustberg, but could not make out what was being said. When asked whether it was a woman's voice she heard, Keating replied in the affirmative. Keating then asked Lustberg if there were students in the area and he stated they were starting to arrive, so she instructed him to call the police and then call him back.

When Lustberg called her back, according to Keating, she could hear that things had escalated and it was at the point where she could hear screaming between people. Keating stayed on the phone with Lustberg until the police arrived and tried to calm him down, as she did not want him to drive in an agitated state.

On cross-examination, Keating testified that she heard Lustberg yell down to Merriss to stop yelling at Eddie, to leave Eddie alone, and there was screaming coming back.

G. Merriss Files a Grievance

On May 3, Merriss filled out a grievance on behalf of D'Or and presented it to Crouse. He immediately denied the grievance and later in the day presented Merriss with an excerpt from the Revenue Contract, one which has been quoted above, which Crouse claimed authorized the Board of Education to utilize the services of outside contractors. Merriss disagreed with Crouse about the significance of this particular provision, pointing out that it related to the inability of the contractor (First Student) to provide services. As Merriss

contended, in this instance the employee in question was not unavailable and First Student could readily have provided such services. The meeting ended in a stalemate.

H. The Board of Education Requests an Investigation of Merriss' Alleged Misconduct

Regional Manager Cappiello testified that Crouse called him on May 3 to advise him of the situation involving Merriss and that the Board of Education was unhappy with what had occurred. Crouse sent over copies of the posting on the Union bulletin board and Cappiello also reviewed the police reports filed by Smith and Lustberg. Cappiello admitted that he was aware that on April 30 Merriss was at the Hurlbutt lot to collect evidence in support of a grievance.

Crouse testified that he was summoned to a meeting with Keating and Lustberg and that they expressed concern over whether Merriss should be driving school-age children.[18]

According to Keating, she reported the incident to Superintendent Belair and then, with the assistance of both Lustberg and Belair, drafted and sent the following letter to Cappiello. Signed by Belair, and dated May 4, it reads in pertinent part:

> I am writing this letter to share my notes and thoughts regarding the safety of Weston students while entrusted with a driver in your employment, Janet Meriss. Based on the information documented below, it is reasonable to conclude that Mrs. Meriss has engaged in very disturbing behavior and has acted extremely inappropriate in response to what she perceives to be a contract violation by Weston Public Schools and/or First Student ("FS"). Based on Mrs. Meriss' hostile actions and accusations, it is my understanding that she believes that: (1) Weston Public Schools ("WPS") has violated its contract with First Student by using school owned SUV's to drive a few athletic trips and field trips; and (2) FS has violated its contract with the bus driver's union by allowing WPS to use the SUV's and to hire drivers. . . .[19]
>
> On Friday, April 30, 2010, at approximately 4:45 P.M., Mr. Lustberg arrived at Hurlbutt Elementary School parking area to prepare two of the district's SUV's to transport students for a high school softball game in Newtown. Upon arrival, Dave Lustberg noticed that Mrs. Meriss was sitting in her parked pickup truck approximately 3 parking spaces from the SUV's. When Mr. Lustberg arrived, Eddie Smith, a FS driver who has been hired on occasion to drive the WPS SUV's as a school employee, was sitting in his car waiting for Mr. Lustberg to arrive. As Mr. Lustberg started to load the softball team's gear into the SUV, Mrs. Meriss began photographing him and the vehicles. This continued for approximately 5 minutes. At approximately 4:50 P.M. the softball players began arriving. At that point, Mr. Lustberg went to Mr. Smith's car to discuss the trip plan instructions. At this point, Mr. Lustberg noticed that the athletes were in the areas that Mrs. Meriss was snapping pictures. Mr. Lustberg then called the WPS Director of Finance and Operations Jo-Ann Keating, who instructed him to call the police, out of concern for the athletes' safety and the inappropriateness of Mrs. Meriss' harassing and intrusive conduct. After Mr. Lustberg called the police, Mrs. Meriss sarcastically stated that, "I cannot believe you are calling the police. I'm just here watching a softball game."

[18] Contrary to Crouse, Lustberg denied discussing the situation with anyone from First Student.

[19] I have omitted portions of this letter which make reference to various provisions of the Revenue Contract as well as the fact that, in November 2009 Lustberg and Crouse had discussed the use of the vans for occasional athletic and field trips, and that Crouse had cleared the use of the vans and also authorized Lustberg to hire First Student drivers in their off hours.

Mr. Lustberg continued to load the SUV's and then again called Dr. Keating on the phone. As Mr. Lustberg was speaking to Dr. Keating, Weston police officer, Bobby Klein entered School Road from Weston Road. When Mrs. Meriss saw the police car, she started her truck and began to pull out of the parking lot. Prior to leaving the lot, Mrs. Meriss pulled her vehicle next to Mr. Smith's car (he was still sitting in his car with the windows open), and screamed out through her open window "you're a fucking scum bag for taking money away from other drivers." Mr. Smith did not respond. Mr. Lustberg stepped between the two vehicles and said to Mrs. Meriss, "Leave him alone. Why are you trying to prevent him from making a living?" Mrs. Meriss replied, "He is a scab." Mrs. Meriss then left the scene, passing the police officer on his way in, and turned into the driver's parking lot of the bus garage. Mr. Lustberg began to give the police officer an account of what had just occurred when the officer noticed Mrs. Meriss taking a picture of him too. At this point Officer Klein approached Mrs. Meriss' car to speak with her about her conduct. The officer spoke with Mrs. Meriss privately, and instructed her to leave.

On Monday, May 3, 2010 at approximately 6:45 A.M., Marilyn Dietzman, the FS dispatcher for Weston, called Mr. Lustberg to ask him to stop at the bus garage when the drivers were out on their routes. Mr. Lustberg arrived at the bus garage at about 7:10 A.M. and found a home made poster with six (6) enlarged photos of Mr. Lustberg, Mr. Smith, Weston Police Officer Bobby Klein, and the WPS SUV's with slanderous and inflammatory statements recorded below the pictures, posted on the wall inside the bus garage. (Please see the attached documents). These actions by Mrs. Meriss have created a hostile work environment at the bus garage for Mr. Lustberg who, as part of his daily duties, makes numerous visits to the bus garage to speak with Mr. Crouse and Mrs. Dietzman, as well as any number of drivers, on numerous daily transportation issues.

In addition, on the morning of May 3, according to Mrs. Dietzman, Mrs. Meriss was inciting and attempting to rally other drivers against Mr. Smith, who was on his way into work at the bus garage. Mrs. Dietzman called Mr. Smith and instructed him to go directly to his bus and not enter the bus garage terminal. She informed Mr. Lustberg and Dr. Keating that she did not want Mr. Smith to be accosted when he arrived, and did not want him to be upset while driving Weston students to school on his route. Due to his fear of coming into work, Mr. Smith ended up arriving late for work and missed his first route, which impacted service for our students. Mr. Smith informed us that he continues to feel uncomfortable going into work based on the hostile environment created for him by Mrs. Meriss.

Given this extremely volatile and aggressive behavior, FS needs to determine if Mrs. Meriss is capable of continuing her employment driving Weston school children, and working cooperatively with WPS employees. Please advise of your next steps and determination, as soon as possible.

I. First Student Suspends Merriss Pending an Investigation of her Conduct

According to Cappiello, at this point in time, a decision was made to suspend Merriss with pay pending the investigation of the incident, which was implemented on May 4. Dietzman called Merriss between morning runs over the bus radio and asked her to come in to speak with Crouse. Ehrismann stated that this was unusual inasmuch as Crouse did not usually arrive to work before 8:00 am. Ehrismann accompanied Merriss to Crouse's office and Crouse gave

Merriss a letter announcing her suspension. Merriss attempted to ask Crouse a question, but he cut her off, stating that it was out of his hands. [20] As regards the investigation, Cappiello testified that he did not recall whether he directed Crouse to obtain a statement from Merriss, but stated that he "would have" directed Crouse to speak with Merriss about the incident. He later testified that he did direct Crouse to obtain a statement from her, but did not review it.

Crouse was primarily responsible for the investigation and in the process he reviewed the statements given to the police by Lustberg and Smith. He did not interview Merriss about the allegations regarding her behavior on April 30. Merriss testified, without rebuttal, that she received no inquiries whatsoever about the events of April 30 from any representative of either First Student or the Board of Education.

Cappiello testified that after he received Belair's letter he attempted to speak with him, but inasmuch as Keating is his primary contact at the school he went to her first. A meeting was arranged between the two to discuss the matter, Belair did not attend. Keating told Cappiello that the Board of Education was disappointed with Merriss' actions. According to Cappiello, Keating stated that she did not feel that there was any way Merriss could continue servicing the Town of Weston. Cappiello said that Merriss was a long-term employee, and asked Keating whether this was they way she wanted to go and Keating said that it was. According to Cappiello, once the Board of Education made its preference known, there was not much that First Student could do about it.

Keating testified that in a telephone conversation subsequent to Belair's letter she asked Cappiello if he could guarantee that the type of behavior Merriss was alleged to have engaged in would not happen again. When he said that he could not, Keating informed him that such behavior was something the Board of Education could not tolerate.

J. First Student Obtains another Statement from Smith

At Crouse's request, on May 11, Smith provided First Student with another written statement regarding the events of April 30 and May 3:

> I was parked in the Hurlbut parking lot waiting for Dave Lustberg. I was scheduled to drive the varsity softball team to Newtown. While I was waiting there I noticed Janet pull into the parking lot and park right behind me. When dave arrived about 10 min later he informed me that Janet was taking pictures of us. Dave had called Joann Keating who informed him to call the police. The police arrived and told Janet that she had to leave cause what she was doing was wrong that she had to take it up with the union. as Janet was leavin she pulled on the side of me and called me a fucking scum bag and to keep taking trips from are drivers at first student. on monday morning Marilyn had called and told me that it was not a good idea to come into the office cause Janet and Yvonne had posted pictures on the wall and they where starting a war in the office. I felt very threatened to come to work I had other drivers saying stuff to me and causing a hostile work environment. I don't appreciate being asked 50 million questions by other drivers cause it is none of there buisness.

K. Merriss is Removed from her Work Assignment and Issued a 3-day Unpaid Suspension.

[20] The letter sent to Merriss states as follows: "This letter is to inform you that your employment with First Student is suspended with pay pending an investigation with the incident of Friday, April 30, 2010 with a school board employee."

On May 14, Merriss received the following letter by registered mail, signed by Crouse:

> First Student/FGA considers our primary obligation to provide safe and reliable transportation to the students and communities we serve. To this end, it is of utmost importance for our employees to be professionals, behaving with dignity and respect toward students, customers, communities, First Student management as well as one another.
>
> On Friday, April 30, 2010 you were seen taking pictures of the Transportation Director, Dave Lustberg for the Town of Weston and Ed Smith a FS Weston employee (driver) while they were getting ready to transport students for an extra curricular event. A district representative Dave Lustberg called police regarding your behavior. Upon pulling away in your car, you pulled up to Ed Smith and the Transportation Director and called Mr. Smith a "fucking scumbag" and called him a "scab." You then pulled away and drove into the drivers parking area where you started taking more pictures this time including the officer. At this point you were instructed to leave by the Police.
>
> You then posted the pictures you took on the board in the office along with a letter calling out Ed Smith for working for the BOE. Your behavior was inappropriate, disrespectful and abusive to the customer and to another FS employee. In the Employee Handbook beginning on page 38, this behavior is explicitly spelled out and it is also very clear that it will not be tolerated from any employee.
>
> Due to the above incidents, you will be on disciplinary suspension for 3 days. After discussions with the District regarding your behavior, it was decided that you may no longer service the contract for the town of Weston; this includes charters, public, private and OOD HTS sectors. First Student is wiling to offer you continued employment at another location provided it is in need of a driver and approved by that District.
>
> Any future incidents of disrespectful, abusive language or treatment of any kind towards any First Student employee or one of its customers and any violation of any First Student policy, at any time in the future, will result in your immediate termination, without recourse or eligibility for rehire with First Student/FGA, any of its locations, affiliates or divisions.

Crouse testified that after he completed his investigation, a decision was made to remove Merriss from driving for the Town of Weston and suspend her for three days without pay. He further testified that due to Merriss' longevity and good work record the decision was made to offer her employment elsewhere rather than discharge her.[21] At some unspecified point in time Merriss was offered employment in Norwalk and declined to accept it. The record fails to establish precisely when that offer was made.[22] Subsequently, on July 30, Crouse reiterated the offer for the Norwalk location and further advised Merriss that she could also return to work in Wilton. Merriss declined this offer as well. According to Merriss, accepting either of these positions would entail a loss of her seniority of 14 years as well as a considerable pay cut. She would also no longer be a member of the Union at either new assignment.

[21] Cappiello similarly testified that Merriss was a long-term employee, that he had a good opinion of her, that she was a good driver and there had been no complaints about her conduct.

[22] Merriss acknowledged receiving the offer, but could not state when it had been made.

Cappiello testified that the company took the position that once the district asked for Merriss' removal there was not much that First Student could do to keep her employed in Weston. With regard to the issue of the three-day unpaid suspension, Cappiello stated that First Student concluded that that Merriss had harassed Smith and that she had "crossed the line." Cappiello stated that Merriss "kind of went after [Smith]" by posting the materials, and that the posting was or could have been construed as offensive to him.

III. Analysis and Conclusions

A. Summary of the Contentions of the Parties

The General Counsel contends that this is a case where the Respondent summarily agreed to another employer's request to discharge an employee for engaging in protected, concerted activity as Merriss investigated a grievance and subsequently shared the findings of her investigation with her coworkers. General Counsel alleges that the Weston Board of Education exaggerated and inflated alleged misconduct by Merriss in the course of her union activities, called for her removal from the contract and that Respondent blindly agreed to the Board of Education's demand that they terminate a long term employee with an excellent work record. In her opening statement at hearing and post-hearing brief, the General Counsel has argued that the lawfulness of the discipline issued to Merriss should be analyzed pursuant to *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) and its progeny and that Merriss did not engage in misconduct, as alleged. In the alternative, relying upon *Atlantic Steel Co*., 245 NLRB 814 (1979), the General Counsel has further argued that even if one were to credit Smith and Lustberg's account of Merriss's conduct at the Hurlbutt parking lot, none of Merriss' conduct on either April 30 or May 3 was sufficiently egregious to have cost her the protection of the Act.

The General Counsel additionally contends that Merriss was unlawfully disciplined pursuant to Respondent's "Prevention of Workplace Violence" rule. In this regard, the General Counsel contends that this rule is both overly broad and was unlawfully applied to discipline Merriss for her Section 7 protected conduct. As the General Counsel alleges, for this additional reason, her discharge and suspension were unlawful.

Respondent contends that the General Counsel's case turns on the testimony of a single witness (Merriss) who denies that she screamed obscenities at Smith and Lustberg in the presence of high school students. Respondent relies upon the testimony of three witnesses (Smith, Lustberg and Keating) who "in varying degrees" testified that Merriss was screaming and using obscenities on this occasion. Respondent argues that regardless of whether Merriss was engaged in protected conduct at the time, she lost the protections of the Act by virtue of such misconduct. *Atlantic Steel*, supra; *Piper Realty Co*, 313 NLRB 1289 (1994). Merriss then posted pictures and continued her attacks on Smith and Lustberg by calling their actions "sneaky underhanded and illegal." As Respondent argues, Merriss' attack on Lustberg, her employer's customer, manifests blatant disloyalty to her employer and accordingly her conduct in this regard is unprotected under Section 7 of the Act. In support of this contention, Respondent relies upon *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and *Endicott Interconnect Technologies v. NLRB*, 453 F.3d 532 (D.C. Cir 2006).

Respondent further contends that as a result of this alleged misconduct, the Board of Education exercised its contractual right to have Merriss removed from the Weston contract. Respondent argues that there is no evidence of anti-union animus in any of its actions and further contends that Merriss was not discharged, but offered other employment which she refused. Thus, Respondent argues, even assuming that Merriss was engaged in protected conduct, it was contractually obliged to adhere to its agreement with the Board of Education to

remove a driver upon its direction to do so, as has been done in the past, and that it cannot be found to have committed an unfair labor practice for doing so. Thus, Respondent has placed its motivation at issue and argues that its decision to discipline Merriss should be analyzed pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399-403 (1983).

Respondent additionally argues that the Union clearly and unambiguously has acknowledged and accepted in its collective-bargaining agreement with First Student the Board of Education's right to request removal of a driver from the contract and that such an acceptance constitutes a clear and express waiver of and by the Union of any claims of protected activity.

With regard to the "Prevention of Workplace Violence" rule, Respondent contends that the General Counsel has offered no evidence to support its theory that it is overly broad or that it prohibits Section 7 activity. In particular, Respondent argues that the General Counsel has failed to show that the policy was adopted due to anti-union considerations where there is not only no evidence of such animus but that the evidence establishes to the contrary: that the Employer maintains policies which are union-friendly. In addition, Respondent argues that there is no evidence that the rule was used to discipline Merriss.

As noted above, Respondent cites to two occasions where Merriss is alleged to have engaged in misconduct worthy of discipline. Although they are intertwined factually and to a certain extent legally, I will analyze them separately. As an initial matter, however, I will first discuss the nature of the disciplinary action issued to Merriss.

B. Merriss was Suspended and Discharged on May 14

As noted above, the General Counsel has alleged that Respondent suspended and discharged Merriss. Respondent has argued that it removed Merriss from the Weston contract as it was required to do under the Revenue Contract and offered her employment elsewhere, which she declined, and that the only adverse employment action attributable to it was Merriss' three-day suspension.

There can be no dispute that certain adverse employment actions were taken against Merriss. I note that the May 14 letter sent to Merriss from Crouse, which announces her suspension and removal from the Weston contract, does not, by its terms, contain an offer of alternate employment or reassignment. It provides only that, "First Student is willing to offer you continued employment at another location provided it is in need of a driver and approved by that District." At that time, there was no representation that either of those conditions had been met. Moreover, there is no independent evidence that Respondent had a position available for Merriss at the time this discipline was issued to her.

In fact, the record is silent as to exactly when Merriss was first offered employment at another location. Neither Crouse nor Cappiello offered specific testimony as to this issue, and Crouse's July 30 letter to Merriss with regard to the Wilton route refers only to a previous offer to work at Norwalk, but does not indicate when such a prior offer had been made.

The General Counsel relies upon Merriss' testimony that the acceptance of First Student's offer of other employment would have resulted in a considerable loss of pay and seniority for Merriss had she accepted either position, a contention which was neither addressed nor rebutted by Respondent. Thus it would appear that any subsequent offer of

employment with First Student was tantamount to an offer for reemployment which would include a concomitant decrease in tenure, salary and benefits rather than a continuance of Merriss' current employment at another location, as Respondent appears to suggest.

Based upon the record evidence, and in particular Respondent's May 14 letter, I find that the General Counsel has shown that the May 14 removal of Merriss from the Weston contract was tantamount to a discharge. Respondent had ample opportunity during the course of the hearing to adduce specific evidence regarding precisely when Merriss was first offered a transfer to another assignment but failed to do so or, alternatively, offer evidence as to why it was unable to do so. Respondent has failed to demonstrate that there was no break in service, or that any such interruption was not due to action on its part. Accordingly, I find that as of May 14, Merriss' employment with First Student was terminated and, accordingly, I find that at that point in time, she was discharged.

With regard to the issue of Merriss' suspension, I note that the complaint alleges that Merriss was suspended on May 4. As discussed above, although Merriss was issued a suspension on that day, it was a paid suspension pending Respondent's investigation of the Board of Education's allegations against Merriss. By its questioning of witnesses during the hearing, and the assertions contained in its post-hearing brief, it appears that General Counsel is contending that the three-day unpaid suspension issued to Merriss on May 14 is unlawful. That particular suspension was not alleged as an unfair labor practice in the complaint; neither did either party address this issue in their opening statements at the hearing. Of course, it would have been the preferred course of action for the General Counsel to have clarified the issue and amend the complaint, as appropriate.

Notwithstanding the foregoing, I conclude that the unpaid three-day suspension issued to Merriss on May 14 is closely related to the subject matter of the complaint and, moreover, has been fully litigated here. As an initial matter, the suspension relates to the complaint allegation that Merriss was discharged for her concerted, protected and Union activities. Both violations stem from the same set of facts and involve Respondent's reaction to Merriss' course of conduct on April 30 and May 3. Both the General Counsel and the Respondent adduced direct and cross-examination testimony regarding this suspension. Moreover, as the record demonstrates, the reasons for this adverse employment action and its effects on Merriss' employment status are clearly intertwined with Respondent's decision to remove her from the Weston contract, in particular as referenced in the documentary evidence relied upon Respondent to assert its defense. Moreover, Cappiello gave specific testimony as to the reasons why Respondent took this action against Merriss. I further note that in its post-hearing brief Respondent has contended that the only adverse employment action attributable to First Student was the three- day suspension and presents a defense to its actions in this regard. Such an assertion establishes that Respondent was aware that the lawfulness of its decision to issue this particular suspension was at issue in this proceeding. See *Dickens, Inc*., 352 NLRB 667 fn. 3 (2008)(and cases cited therein).

C. Merriss' Concerted, Protected Conduct

Here, as Respondent appears to concede in its post-hearing brief, there can be no serious doubt, that by initiating a grievance investigation on the evening of April 30 Merriss was engaged in concerted protected conduct. Merriss, acting as Union president, went to the Hurlbutt lot to obtain evidence as to who was performing work which had originally been assigned to and then removed from a bargaining unit member and to determine how much work had actually been taken away from him. As Merriss made clear in her testimony, the Union's position was that the trip had not been cancelled, as the employees had been told, but that it

was being performed by non-unit personnel. By taking photographs of Smith, Lustberg and the vans, Merriss was seeking evidence to support a grievance over this issue. Thus, Merriss was seeking information about a possible remedy to the unit driver for the removal of such work in terms of lost pay.

Whether such a grievance would ultimately have merit is of no moment. An honest and reasonable assertion of a collectively-bargained right, even if incorrect, is protected concerted activity. *NLRB v. City Disposal Systems Inc*., 465 U.S. 822 (1984); see also *Dodger Theatricals Holdings, Inc*., 347 NLRB 953, 967-968 (2006)(and cases cited therein) (the Board will not pass on the eventual probability of success of a grievance in concluding that a union has a reasonable basis for pursuing it); *Tillford Contractors*, 317 NLRB 68, 69 (1995)("When an employee makes an attempt to enforce a collective-bargaining agreement, he is acting in the interest of all employees covered by the contract. It has long been held that such activity is concerted and protected under the Act." (Citing *Interboro Contractors*, 157 NLRB 1295 (1966)).

In addition, contrary to the contentions of Respondent, and as will be discussed further below, I have found Merriss' posting on the Union bulletin board was protected. Merriss, as Union president, was communicating information regarding the results of her investigation using the traditional means (a union bulletin board) for dissemination of such information. Moreover, I have found that the content of Merriss' posting was not sufficiently opprobrious to remove her communications with her coworkers from the protections of the Act, or lawfully serve as a basis for disciplinary action taken against her.

Here, there is also no dispute that First Student had knowledge of Merriss' protected conduct. As an initial matter I note that the evidence establishes that local Union officials had meetings with both Dietzman and Crouse where they expressed the Union's concern that the vans would be used to perform bargaining unit work. The Employer knew that the Union had been disputing this practice and Cappiello admitted that he was aware that Merriss was at the Hurlbutt parking lot on April 30 to investigate a grievance. Belair's letter to Cappiello makes it clear that both First Student and the Board of Education were aware that Merriss' conduct was based on the Union's position that the Board of Education could not take work away from bargaining unit drivers. As Belair wrote: "Based upon Mrs. Meriss' hostile actions and accusations, it is my understanding that she believes that: (1) Weston Public Schools ("WPS") has violated its contract with First Student by using school owned SUV's to drive a few athletic and field trips; and (2) FS has violated its contract with the bus driver's union by allowing WPS to use the SUV's and to hire drivers."

Moreover, there is no dispute that on May 3, prior to any discipline being imposed on Merriss, she filed a grievance over the removal of work from D'Or.

D. The Asserted Reasons for Merriss' Discipline

As set forth above, and discussed in further detail below, in this case there have been various misconduct allegations leveled against Merriss relating to her activities on April 30. These were initially as set forth in the police reports filed by Smith and Lustberg, subsequently outlined Belair's letter to Crouse, reiterated in the statement given to First Student by Smith on May 13 and, finally, set forth in the testimony adduced by Respondent at the hearing.

Respondent's May 14 letter, authored by Crouse, setting forth the basis for Respondent's belief that Merriss engaged in misconduct and that discipline was warranted was as follows: she was seen taking pictures of Lustberg and Smith; that upon leaving the parking lot Merriss called Smith a "fucking scum bag" and referred to him as a "scab;" that she pulled

into the driver's parking area and continued taking pictures and that Merriss then posted the pictures "on the board in the office along with a letter calling out Ed Smith for working for the [Board of Education]." Respondent asserted that such behavior was, "inappropriate, disrespectful and abusive to the customer and to another FS employee." Crouse was not questioned about this letter at all and Cappiello offered scant testimony to supplement or otherwise explain its contents.

Since May 14, additional allegations of misconduct have been presented to support Respondent's decision to discipline Merriss, which are not set forth in Crouse's letter. Indeed, certain allegations appear to have been aired for the first time at the hearing. As outlined in Respondent's post-hearing brief, these are that Merriss screamed obscenities directed at Lustberg in the presence of high school students;[23] that Merriss otherwise was "yelling" and "screaming" (again, in the presence of students) during the time she was at the Hurlbutt parking lot; that she inappropriately photographed students and that her behavior generally was sufficiently threatening to cause Lustberg to summon the police.

Respondent, relying upon *Atlantic Steel*, supra, and its progeny asserts that the foregoing instances of misconduct caused Merriss to forfeit protection under the Act.

Because I cannot and will not presume to know more than what is in the record regarding the asserted reasons for Respondent's decision to discipline Merriss *at the time it was made*, I rely upon Crouse's May 14 letter to Merriss to constitute an admission as to the reasons why adverse employment actions were taken against her. I have additionally considered and given appropriate weight to any credible testimony offered by Crouse and Cappiello which explained or otherwise cast light upon the contents of this letter.

Additionally, while it is apparent from the foregoing that Merriss was disciplined for conduct arising out of her protected grievance investigation, Respondent has additionally argued that it was obliged to, and would have removed her from the Weston route pursuant to its contractual arrangements with the Board of Education, upon their request. The May 14 letter makes reference to "discussions" held with the Board of Education. While the testimony of Crouse and Keating is not entirely consistent regarding their communications with each other about this matter, based upon the record as a whole I find that Respondent had, in fact, received a request from the Board of Education to remove Merriss from the Weston contract, or that, at the very least, Respondent had some basis to presume that this was the Board of Education's preference.[24]

For the reasons set forth below, however, I have concluded that the General Counsel has shown that Merriss did not, in fact, engage in misconduct as alleged in Crouse's May 14 letter on April 30. I further find that the record establishes that the additional acts of misconduct which have since been alleged by Respondent and which were not explicitly set forth in Crouse's May 14 letter failed to occur as well. Moreover, I find that Merriss posting and related comments on May 3 did not cost her the protection of the Act.

1. Credibility resolutions

[23] In his initial statement to police Lustberg stated that Merriss verbally attacked and harassed Smith in front of him and the students; but made no reference to any verbal attack on him.

[24] I further note that the General Counsel does not dispute this point.

There are competing accounts of what occurred on the evening of April 30. As Respondent notes in its brief, three witnesses testified that Merriss "in varying degrees" screamed and shouted obscenities to Smith and Lustberg. It is also alleged that this conduct took place in the presence of students. Merriss, to the contrary denies that she said anything to Smith or Lustberg and maintains that she left the Hurlbutt parking lot when students began to arrive. Both Respondent and the General Counsel have advanced a number of arguments as to why I should credit their witnesses' accounts of events and, conversely, discredit the witnesses of the other party, and these arguments have been reviewed in light of the record and carefully considered.

Respondent argues that the General Counsel's case rests solely upon the testimony of a single witness. It has been found, however, that a greater number of witnesses on one side of an issue is not necessarily a controlling factor. *Abbott Labs v. NLRB*, 540 F.2d 662, 667 (4th Cir. 1976)(credibility not determined by a mere "head count"); accord: *NLRB v. Union Carbide Caribe, Inc*. 423 F.2d 231, 233 (1st Cir. 1970). This is particularly true where some of the witnesses supporting the version having numerical superiority are contradicted by others who support the same ultimate facts or by their own prior statements. *Abbott Labs*, supra. See also *Riley-Beaird*, 259 NLRB 1339, 1367 fn. 115 (1982) (sole witness credited over the testimony of five others); *George C. Foss Co*., 270 NLRB 232, 237 (1984) (credibility not determined by the number of witnesses but rather by their trustworthiness); *Salt River Valley Water Users' Ass'n*, 262 NLRB 970, 974 fn. 10 (1982)(credibility determinations are not based on numbers, but rather upon demeanor and logic of probability). Here, in disagreement with Respondent, I do not find the sheer number of witnesses to be convincing, given the contradictory and inherently improbable statements of witnesses concerning certain key points of the case.

Respondent challenges Merriss' credibility on several other grounds. In particular, Respondent argues that Merriss did not behave in a manner consistent with someone who had been falsely accused of misconduct in that she failed to protest the allegations made against her. I note however, that neither First Student nor the Board of Education provided Merriss with any opportunity to contest such allegations prior to the issuance of Crouse's May 14 letter. Moreover, both Ehrismann and Merriss presented unrebutted testimony that when Crouse presented Merriss with notice of her indefinite suspension on May 4, he rebuffed her attempt to discuss the issue, stating that it was out of his hands. Thus, I find that it would have been reasonable for Merriss to assume that any denials would fall on deaf ears, as her discipline was presented to her as a fait accompli.[25]

Respondent argues that Merriss demonstrated a defensive and evasive attitude when questioned on cross-examination regarding the nature of the language she was alleged to have used while at the Hurlbutt parking lot. In the exchange pointed to by Respondent's counsel, I find that Merriss did initially behave in a wary fashion, as if she suspected that Respondent was laying a trap for her. After some clarification of the allowable parameters of Respondent's inquiry, however, Merriss was responsive to the question. Overall, I find that that Merriss generally was cooperative during cross-examination even while she maintained her version of events with some forcefulness.

Respondent points to Merriss' testimony that Lustberg approached her and asked her why she would not leave Smith alone. Respondent argues that this is a tacit admission that

[25] I further note that Merriss has filed a grievance over her discharge. The current status of the grievance is unclear from the record. In any event, no party has argued that deferral of this matter is appropriate.

Merriss was harassing Smith because Lustberg would have had no reason to make such a comment had Merriss not been doing so. Evaluating Lustberg's comments in context, however, I find that they were more likely addressed to the issue of the grievance investigation and its potential economic impact on Smith rather than to any obscenity or other harassing comment screamed by Merriss. Lustberg (corroborating Merriss in this regard) admitted that he also made reference to the fact that Smith was just trying to make a living. In my view, it is more likely that such a statement would be in response to the fact that Merriss was seen as taking action which might interfere with Lustberg's prerogative to assign extra work to Smith. I further find this interpretation of Lustberg's comments to be more consistent with the evidence in light of the fact that Lustberg failed to testify to any specific statement made by which Merriss purportedly harassed Smith.

Thus, based upon the foregoing, I find Respondent's challenges to Merriss' credibility to be unavailing. To the contrary, I was generally impressed with Merriss' demeanor while testifying. Her testimony was consistent and logical. She was specific and precise. She struck me as someone who was, overall, confident in her recollection of events.

Moreover, based upon my assessment of the evidence, I find that Respondent's witnesses were, in substantial part, not credible in their descriptions of Merriss' alleged misconduct.

While it is the case that witnesses testifying truthfully to an event based on their best recollection will often not have identical or fully consistent testimony regarding the sequence of events or what occurred on a particular occasion, I find that here there are significant discrepancies which go beyond what might ordinarily be expected from truthful witnesses. This includes incongruities between events as reported by Smith and Lustberg at the hearing, significant variances between their prior statements and their testimony at the hearing, the apparent escalation of various assertions of misconduct as well as the inherent improbability of the circumstances as described by Respondent's witnesses, all of which leads me to question their veracity.

With regard to Smith, I note that his testimony that Merriss called Lustberg an "asshole" and said "fuck you" to him was not set forth in either the statement Smith provided to the police or the one he subsequently gave to First Student. I find Smith's explanation - that he only reported what occurred to him and not to anyone else - to be less than persuasive. Smith failed to identify or otherwise provide any detail about who may have given him such a limiting instruction or when it may have been told to him. Moreover, I find it improbable that Smith would have omitted these allegations from his prior statements, had such conduct actually occurred, since Smith made his personal displeasure with Merriss' activities apparent and because the point of providing such statements was to document misconduct Merriss was alleged to have engaged in.

Moreover, Smith's assertions regarding these particular obscenities have never been corroborated by Lustberg, their alleged target, and there is no evidence that Smith otherwise reported such misconduct to anyone prior to the hearing. I note that these allegations do not appear either in the letter Belair sent to Crouse or the letter Crouse sent to Merriss. Had Merriss actually yelled obscenities to a representative of the Board of Education, it stands to reason that this misconduct would have been discussed somewhere within these two documents. Moreover, while these allegations were noted by counsel for Respondent in his opening statement, neither Crouse nor Cappiello made any reference to such misconduct in their testimony at the hearing or offered any explanation of why such alleged misconduct would not have been set forth in the May 14 disciplinary notice issued to Merriss. Accordingly, I conclude that Smith has trumped up

this testimony, and that such fabrications are of recent invention. They further demonstrate Smith's propensity to make false allegations incorporating the use of obscenities. This tends to cast an unfavorable light upon his testimony in its entirety.[26]

As noted above, Respondent has, at hearing and in its post-hearing brief, placed great reliance upon the assertion that students were present to observe and overhear Merriss' outburst(s), and that they were inappropriately photographed by her. The evidence fails to support such contentions.

As an initial matter, this seems to have been an allegation which originated with Lustberg in his police statement where he stated that Merriss was "possibly" taking pictures of members of the girls' softball team and that she verbally harassed Smith in front of the students. Belair's letter to Crouse asserts that "the athletes were in the areas that Mrs. Merriss was snapping pictures," and implies that they were present at the time of Merriss' verbal outburst directed at Smith. I find, however, that Lustberg offered inconsistent accounts of events at the Hurlbutt lot that evening. For example, Lustberg wrote in his police report that Merriss verbally attacked Smith in front of him and the high school students and that he "thereafter" called the police, presumably in response to her inappropriate behavior. However, Lustberg's police report is inconsistent with his testimony at the hearing where he stated that when he arrived at the Hurlbutt lot it was "virtually empty." He then saw Merriss taking pictures, told Smith to remain in his car, telephoned Keating and then called the police. He further testified that the students did not arrive until after that had occurred. It was only when the police were arriving, and Merriss was pulling out of the lot that she screamed at Smith through the open window of her vehicle. Thus, according to his testimony at the hearing, Lustberg's call to the police occurred not only before the students arrived, but also prior to any alleged verbal harassment of Smith. Based upon this account it is apparent that Lustberg's call to the police was not precipitated by any alleged harassment of Smith or other inappropriate outburst in the presence of students, but rather by his discomfiture with Merriss' presence and the fact that she was, as he reported to Keating, "taking pictures of him, Smith and the vans."

Moreover, I note that Smith makes no mention whatsoever of the fact that there were students present at any time Merriss is alleged to have made *any* remark, obscene or otherwise, in either of his written statements. I find that this is a significant omission, as the presence of the students and the fact that they would have overheard such language has been so highly stressed by the Respondent. In fact, there is no evidence that Smith ever raised the issue of whether students were present until he testified at the instant hearing, and only did so after he was directly asked by Respondent's counsel whether students were there at the time. In this regard, Smith first testified that "a couple" and then that "a good amount" of girls were present at the time Merriss cursed at Lustberg (testimony which, again, was not corroborated by Lustberg). Smith further testified that the girls were in the perimeter of the parking lot when Merriss "screamed out" that he (Smith) was a "fucking scum bag." Smith failed to offer any explanation as to why these allegations had not come out previously. As noted above, I have found that Smith is generally not a credible witness and therefore have serious doubt on his testimony as to this issue.

I further note that, according to his testimony at the hearing, Lustberg instructed arriving students to remain in the vicinity of the vans. On cross-examination, Lustberg reiterated that Merriss was "absolutely" taking pictures of the students and that she had the camera out while

[26] Moreover, it is apparent that Respondent did not rely upon these allegations in deciding to discipline Merriss.

12 students were present and standing around the vans. It is apparent, however, that none of Merriss' photographs of the vans which were posted on the Union bulletin board contain pictures of anyone other than Lustberg, Smith and one police officer. When this apparent inconsistency between his testimony and the photographic evidence was pointed out to him, Lustberg was unable to address it in any meaningful manner, arguing only that the absence of students in the photographs did not necessarily mean that such photographs had not been taken.

Accordingly, I conclude that Merriss did not take photographs of the girls' softball team and, more generally, credit Merriss' testimony that she left the parking lot as students began to arrive. I find it significant that there is no mention of the presence of students in the disciplinary notice Crouse issued to Merriss, and neither Crouse nor Cappiello testified to this as a reason for the discipline imposed. Moreover there is no evidence that such assertions were considered or investigated at the time.

There are other reasons why I find Respondent's assertions regarding Merriss' alleged misconduct on April 30 to be less than convincing.

As an initial matter, I conclude from the record that Lustberg did not hear Merriss call Smith a "fucking scum bag" or otherwise verbally harass him on April 30. In this regard, I note that other than asserting that Merriss called Smith a "scab," Lustberg has never offered a specific account of anything else Merriss may have said to Smith, either in his police report or his testimony; nor did he explain why he was unable to do so.

Moreover, Lustberg was evasive when asked on cross-examination whether he reported Merriss' outburst to the police on April 30, when they arrived pursuant to his phone call. From such equivocations, it is apparent that Lustberg did not, in fact, report this conduct to the police that evening. This raises the obvious question of why, if Merriss had in fact been engaged in the sort of misconduct as has been alleged, Lustberg would not have done so at the time.

In addition, Lustberg came forward with certain testimony which, because it is inherently implausible, casts light upon his credibility generally. For example, Lustberg initially denied knowing either that Merriss was the Union president or what she was doing at the Hurlbutt parking lot that evening. Lustberg then again equivocated, stating that he did not know whether he knew about Merriss' position with the Union at the time. Lustberg also maintained that although he knew there was a union in place he did not know anything about the First Student contract with the Union. These prevarications cannot be given serious credence. Lustberg, who according to his testimony formerly practiced as an attorney, would surely have been aware of the significance of the fact that the First Student drivers were part of a collective-bargaining unit. I find it quite improbable that, given his daily interaction with First Student drivers and managers for a period of well over one year, Lustberg would not know who the local Union officers were or be unfamiliar with the First Student collective-bargaining agreement. In this regard, I note that it is otherwise apparent that Lustberg was familiar with the contractual seniority and bidding rules as he deliberately selected less senior drivers (i.e. those who were unable to successfully bid on preferable routes such as the kindergarten runs) to drive for him.

Moreover, the logical conclusion that one draws from Smith and Lustberg's conduct upon seeing Merriss in the Hurlbutt lot, taking photographs, supports a finding that they knew, or at least suspected, she was investigating the assignment of the girls' varsity softball trip to Smith. After all, Lustberg admittedly knew that the trip had been previously bid on, and awarded to a First Student employee. It is reasonable to assume, in the absence of any explanation to the contrary, that Lustberg's repeated admonitions to Smith to remain in his vehicle were an

attempt to prevent Merriss from obtaining photographic evidence linking Smith to the trip. Moreover, I find that Lustberg's summoning of the police on this occasion was not in response to any misconduct on the part of Merriss but rather an attempt to interfere with her taking of photographs in an effort to curtail what he (and Keating) must have suspected was an investigation of a work assignment which the Board of Education personnel reasonably would have anticipated that the Union would protest.

Lustberg and Keating's testimony that Merriss was "yelling" and (as Keating put it) "screaming" during the course of their telephone conversations is but one example of how the allegations against Merriss have escalated over time. I note that these assertions do not appear in Lustberg's (or Smith's) statements to the police or, more tellingly, in the Board of Education's letter to Cappiello, which Keating claims to have authored with Lustberg's assistance. Lustberg testified that although Merriss was yelling while he was on the phone with Keating, he did not listen to the disturbance as he was concentrating on his discussion with Keating. It strains credulity that Lustberg would not bother to listen to what Merriss was "yelling" or report this misconduct to Keating at the time, given the express purpose of their telephone conversations.

As regards Keating's testimony, reporting that that she heard a female voice "yelling," and that it later escalated to "screaming," I find it unlikely that Keating would been able to overhear, through Lustberg's cell phone, Merriss, who had remained in her vehicle, "yelling" or even "screaming" from some distance away. Moreover, it is improbable that Keating would have failed to inquire about the source of any such commotion, had she actually heard it. I further note that Keating made vague references to overhearing an "exchange" but there is no evidence of any such exchange which may have occurred while Lustberg was on his cell phone with Keating. And, in any event, there is no evidence that allegations that Merriss generally was "yelling" or "screaming" during the time she was at the Hurlbutt parking lot were ever made to Respondent prior to her discipline, and it is apparent from Respondent's May 14 letter as well as from the testimony of Crouse and Cappiello that this did not factor into Respondent's decision to discipline her.

Finally, I must note that the inherent probabilities of the situation generally tend to favor Merriss' version of events. Merriss went to the Hurlbutt parking lot to investigate and collect evidence in support of a grievance. It would not have been in her best interest to initiate a confrontation with either Smith or Lustberg at that time.[27] Moreover, based upon her personnel records, at the time of the events in question, Merriss was 64 years old.[28] As Smith testified, he is 24 years old. Moreover, as I observed and as is corroborated by the photograph Merriss took of him, he has an imposing physical presence. Lustberg appears to be considerably younger than Merriss as well, and as has been noted above, is an athletic coach. While Merriss did strike me as someone who would have no difficulty speaking her mind, I nevertheless find it improbable that Merriss, who was alone that evening, would have engaged in exchanges with these men involving the sort of fighting words testified to by the witnesses: in particular, calling Lustberg an "asshole" or saying "fuck you" to him, as Smith testified, or that she would have called Smith a "fucking scum bag." To the contrary, I find it far more likely that these allegations of misconduct, which were not reported to the police when they initially arrived at the Hurlbutt Parking lot and which only surfaced after Merriss posted the results of her investigation on May 3, stemmed from the discomfiture Smith and Lustberg experienced when the pictures and related materials were put on view and from their admitted consternation with the nature of

[27] In this regard, I note that it is uncontested that Merriss remained in her car during the time she was stationed in the Hurlbutt lot.

[28] Her date of birth is December 27, 1945.

Merriss' comments.

Based upon the foregoing, I find that Merriss' purported misconduct was grossly overstated and, in fact, largely fabricated by Respondent's witnesses. I conclude that Merriss did not call Lustberg an "asshole" or say "fuck you" to him. I further conclude that she did not engage in any extended period of "yelling" or "screaming," and further find that she did not call Smith a "fucking scum bag" or that that she inappropriately photographed students or that students were present or that they might have heard any of the foregoing comments, had they in fact been made.

I conclude, therefore, that the General Counsel has shown that Merriss did not engage in misconduct, as alleged by Respondent, on the evening of April 30.

2. Merriss' alleged "misconduct" was not sufficient to remove her from the protections of the Act.

While maintaining that Merriss did not engage in misconduct, General Counsel has argued, in the alternative, that any alleged misconduct would not have been sufficient to remove her from the protections of the Act in any event. As has been noted above, Respondent has, to the contrary, argued that such misconduct was sufficient to cause Merriss to forfeit the Act's protections. I have decided to address these allegations because in my view the General Counsel's *Burnup & Sims* theory does not fully address all material aspects of this case; in particular the nature of Merriss' May 3 posting and the discipline that was issued to her at least in part for such conduct. Moreover, I find that a response to the Respondent's contention that Merriss lost the protections of the Act is relevant to a consideration of its asserted *Wright Line* defense, which will be discussed below. Again, I confine my analysis to those allegations of misconduct set forth in Crouse's May 14 letter which, in my view, accurately reflect the rationale for the discipline imposed at the time the decision was made.[29]

a. The events of April 30

Inasmuch as it is undisputed that Merriss' discipline was, in significant part, occasioned by her April 30 encounter with Smith and Lustberg which, in turn, stemmed from her investigation of a potential grievance, the appropriate analysis is whether the conduct for which she was disciplined was initially protected by the Act and, if so, whether she would have lost the protection of the Act at any point. See *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1425 fn. 8 (2004). As the Board has held, "when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Datwyler Rubber & Plastics Co*., 350 NLRB 660, 670 (2007); *Noble Metal Processing, Inc*., 346 NLRB 795 (2006), quoting *Sanford Hotel*, 344 NLRB 558 (2005).

Thus, an employer violates the Act by disciplining an employee engaged in protected, concerted activity unless in the course of that conduct, the employee engages in opprobrious conduct, costing her the protections of the Act. *Atlantic Steel*, 245 NLRB 814, 816-817 (1979). See also *Felix Industries*, 331 NLRB 144, 146 (2000), enf. denied and remanded, 251 F.3d 1051(D.C. Cir. 2001), on remand *Felix Industries, Inc*., 339 NLRB 195 (2005). In that connection, the standard for determining whether specified conduct is removed from the

[29] Based upon the above-described credibility resolutions, I give no weight to the post-hoc allegations of misconduct set forth by Respondent.

protections of the Act, is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007).

The rationale behind such a stringent standard, as set forth by the Board, is as follows:

> The protections of Section 7 would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, bonus and working conditions are among the disputes most likely to engender ill feelings and strong responses

Consumers Power Company, 282 NLRB 131, 132 (1986).

Thus, Board law, supported by the courts, is that employees are permitted some leeway for impulsive behavior when engaging in concerted activity, subject to the employer's right to maintain order and respect. See *Piper Realty Co*., 313 NLRB 1289, 1290 (1994); *NLRB v. Ben Pekin Co*., 452 F.2d 205, 207 (7th Cir. 1991); *NLRB v. Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965).

In assessing such conduct, the Board looks at four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *Atlantic Steel*, supra; *Datwyler Rubber & Plastics* Co., supra.

Addressing the first factor, under all the circumstances, I find the location of Merriss' alleged outburst favors protection. Here, Merriss was engaged in a grievance investigation, outside of regularly scheduled work (and school) hours. While the events in question took place in an elementary school parking lot, they did not involve students or other First Student personnel. The only other individuals present were those directly involved in the conduct being investigated as the basis for the grievance. Moreover, Merriss remained in her car and did not disrupt the work of these employees by taking photographs of them. Further it is apparent that the vans transported the students to the game without incident. In fact, the only possible disruption to the ordinary course of events occurred as a result of the Board of Education's decision to summon the police. There were no other inadvertent witnesses to the event. Moreover, regarding the fact that the incident involved an employee of the Board of Education, and therefore a customer of the Employer, I note that Lustberg has never claimed to have heard Merriss utter any obscenity or given specific testimony regarding anything she may have said to otherwise verbally harass Smith. With regard to her comment that Smith was a "scab," assuming it was uttered, that statement was made in response to Lustberg's challenge to her actions. On whole, therefore, I find that the first factor favors protection under the Act.

As to the second factor, I conclude that the subject matter of the discussion weighs in favor of protection. Again, assuming that Merriss told Smith that he was a "fucking scum bag" for taking money away from other drivers, and later referred to him as a "scab," such comments, are linked directly to the grievance investigation and refer to the fact that Smith was, in fact, performing work which, pursuant to an agreed-upon contractual process, had been awarded to another employee. Thus, Merriss' purported outburst was related to terms and conditions of employment of particular concern to Merriss as a Union official responsible for protecting a unit employee's rights under the collective-bargaining agreement and was an expression of frustration relating to her view that the work had been unfairly taken away from D'Or.

As to the third factor, I find that the nature of any alleged outburst weighs does not weigh

against protection. The Board has on many occasions found that that strong, foul and even profane language which occurs during the course of protected activity does not justify disciplining an employee who is acting in a representative capacity. *Alcoa, Inc*., 352 NLRB 1222, 1225(2008) (referring to a supervisor as "egotistical fucker"); *Union Carbide Corporation*, 331 NLRB 356, 359 (2000) (calling supervisor a "fucking liar"); *Burle Industries*, 300 NLRB 498, 502, 504 (1990)(calling supervisor a "fucking asshole"); *Thor Power Tool Co*, 148 NLRB 1379, 1380 (1964), enfd 351 F.2d 584 (7th Cir. 1965) (referring to supervisor as a "horses ass"); see also *Max Factor & Co*., 239 NLRB 804, 818 (1978); *Postal Service*, 250 NLRB 4 (1980); *Noble Metal Processing, Inc*., supra. In *Union Fork & Hoe Co*., 241 NLRB 907 (1979), the Board reaffirmed the principle that in presenting and processing grievances union stewards retain the protection of the Act except for extreme misconduct in the performance of their union duties.

In making this finding, I am mindful that Respondent has argued that Merriss' inappropriate outburst took place in the presence of its customer. However, none of the comments Merriss is alleged to have made which served as the basis for her discipline were addressed to Lustberg. Moreover, once again, I am obliged to note that Lustberg never testified to hearing Merriss make any obscene remark to him, to Smith, or to anyone else.

As for Merriss' characterizing Smith as a "scab," this comment was purportedly made not on Merriss' initiative, but as result of Lustberg's demand to know to why Merriss would not leave Smith alone and allow him to earn a living. Given this context, I find that her use of such a term, unaccompanied by any threat of physical gestures or contact, would not be sufficiently opprobrious to remove her from the protections of the Act. See e.g. *Nor-Cal Beverage Co*., 330 NLRB 610, 611 (2000), citing *Linn v. Plant Guards Local 114*, 83 U.S. 53, 60-61 (1966); *Letter Carriers Local 496 v. Austin*, 418 U.S. 264, 282-283 (1974).

Finally, I find that the fourth factor, provocation, does not weigh in favor of protection as there was no evidence of prior or concurrent unfair labor practices related to the outburst or the underlying grievance. See *American Steel Erectors, Inc*., 339 NLRB 1315, 1317 (2003). In this regard, I note that while it could be argued that the summoning of police to curtail Merriss' grievance investigation could be considered "provocative" in the colloquial sense, and under certain circumstances could be considered violative of Section 8(a)(1), there is no evidence that such a decision stemmed from any agent of the Respondent. [30] However, this is the only factor which I have found favoring a finding that Merriss' conduct was not protected.

In sum, under the four-factor test of *Atlantic Steel*, I cannot conclude that Respondent's allegations of Merriss' conduct in the Hurlbutt parking lot as set forth in Crouse's May 14 letter, if true, would have been sufficiently egregious to cost her the protection of the Act.

b. Merriss' posting of photographs and comments on the Union bulletin board was protected conduct.

Respondent maintains that Merriss' posting of the photographs taken on April 30 and her written comments, in particular referring to Smith and Lustberg's actions as "sneaky, underhanded and illegal" was a brazen and public attack on her employer's customer and as such, constitutes an act of unprotected conduct and disloyalty sufficient to warrant her discharge. In support of these contentions, Respondent relies upon in *NLRB v. Electrical*

[30] The General Counsel has argued that Lustberg should be considered affiliated with Respondent as he routinely gives direction to its drivers. As noted above, there is no joint employer allegation; nor does the complaint allege that Lustberg is an agent or otherwise affiliated with First Student.

Workers Local 1229 (Jefferson Standard), 346 U.S. 464 (1953) and *Endicott Interconnect Technologies v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006). Respondent further argues that by her postings and other conduct Merriss disrupted its operations.

General Counsel contends that the dissemination of union-related information at work lies at the core of the protections afforded to employees. *NLRB v. Magnavox*, 415 U.S. 322, 325 (1974). The General Counsel further argues that Respondent's characterizations of the effects of these postings are exaggerated and that they were not disruptive to Respondent's operations.

In agreement with the General Counsel, I find that Merriss' postings on May 3 were protected under the Act and that she did not lose the protections of the Act either through an act of disloyalty or disruption of Respondent's operations. Nor were her comments otherwise sufficiently opprobrious to remove her from the protections of the Act.

As an initial matter, I find Respondent's suggestion that Merriss was causing a disruption in the workplace to have a wholly inadequate evidentiary foundation. Ehrismann credibly testified that, as Merriss was posting the material, she told the drivers who were present at the time that the Union would be filing a grievance over the issue. Such comments are protected by the Act. There is no probative evidence that Merriss was interfering with the work of employees at the time or by such comments. Testimony or other references to purported statements or observations which may have been made by dispatcher Dietzman as to Merriss' actions on that morning are uncorroborated hearsay and I give them no weight. If Merriss had been, in fact, causing a disruption in the driver's room, Respondent could have easily called Dietzman, its employee, to testify to her actions on that day. The fact that Respondent failed to do so, and further failed to offer any explanation as to why it did not or could not do so, leads me to draw an inference that had Respondent questioned Dietzman on this matter, and she testified truthfully, her testimony would be adverse to Respondent. *Parksite Group*, 354 NLRB No. 90, slip op at 5 (2009); *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1048 and fn. 8 (7th Cir. 2006); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). [31]

Smith testified that he was told by Dietzman to report directly to his bus and not to come into the office that day; however, he also acknowledged that he performed his runs as scheduled. Similarly, Merriss and Ehrismann testified, without contradiction, that they performed their runs as scheduled. Inasmuch as Lustberg is responsible for monitoring the drivers' performance, and he did not testify to any service disruptions on that morning, I conclude that it was business as usual and that there were no problems with transporting students on that day. I further note that there is no reference in Crouse's May 14 letter of any disruption in the drivers' room or more generally of operations on May 3.

I additionally find that the substance of Merriss' posting was protected and that while the Smith and Lustberg may have taken offense at its contents, it nonetheless retained the protections of the Act.

As an initial matter, I note that the material in question was posted in a First Student facility, on a bulletin board which was designated for Union and employee communications. There is no contention that Merriss was not authorized to post Union-related matters in that

[31] I note that the collective-bargaining agreement covers bus drivers and specifically excludes all other employees. Accordingly, I have no basis to presume that Dietzman would not have been favorably disposed to testify in the interests of her employer.

location. Moreover, contrary to the situation presented by *NLRB v. Electrical Workers Local 1229* supra, and *Endicott Interconnect Technologies v. NLRB,* supra, both relied upon by Respondent, the material was not disseminated to the public. Further, there is no evidence that Merriss or any other Union officer gave notice to the Board of Education about the posting or its contents.

Moreover, Merriss had a protected right to share the results of her grievance investigation with her coworkers. As noted above, the matters at issue related directly to work assignments, wages and other terms and conditions of employment and thus fell within the scope of the protections of the Act and Merriss' role as a Union officer in enforcing the collective-bargaining agreement.

This brings me to the accusation made by Respondent that Merriss' statement that Smith and Lustberg had behaved in a "sneaky, underhanded and illegal" manner was derogatory of the customer and thus disloyal. Respondent argues in this regard that neither First Student nor or the Board of Education engaged in any subterfuge or illegal conduct; thus for Merriss to make such insulting comments renders her conduct unprotected and warrants her discharge. In support of this contention, Respondent relies upon *NLRB v. Electrical Workers Local 1229*, supra; *Endicott Interconnect Technologies v. NLRB,* supra.

The truth or falsity of Merriss' accusations is not the test for determining whether Merriss' concerted activity became unprotected by virtue of such accusations. *Linn v. United Plant Guard Workers*, supra. Rather, the test is whether the communication is "so disloyal, reckless or maliciously untrue [as] to lose the act's protection." *Emarco, Inc*., 284 NLRB 832, 833 (1987); accord *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000).

The statements at issue in *NLRB v. Electrical Workers Local 1229* were found unprotected because they constituted "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." In addition, they failed to have a discernable relationship to an ongoing labor dispute. 346 U.S. at 472; accord *Endicott Interconnect Technologies*, supra at 537. As the Board has noted however, it is careful to "distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues. . .To lose the Act's protection as an act of disloyalty, an employee's public criticism of an employer must evidence 'a malicious motive.'" *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007)(internal citations omitted).

Here, as noted above, and in contrast to the cases relied upon by the Respondent, the statements at issue were not publicly disseminated, but were rather posted on a board historically used for communications by and among employees. There is no evidence that Merriss intended to make the nature of the Union's dispute with the Employer (or the Board of Education) known beyond the immediate bargaining unit that had been affected by the transfer of work formerly performed by unit employees.

Further, as the Board has held, while statements are unprotected if they are maliciously untrue, (i.e. made with knowledge of their falsity or with reckless disregard for their truth or falsity), the mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. *Valley Hospital Medical Center*, supra (and cases cited therein). Moreover, in the context of a labor dispute, the fact that an employee's statements are exaggerated or hyperbolic does not render them unprotected. *Valley Hospital Medical Center*, supra at 1235; *Emarco*, supra at 834.

Here, the posting sets forth the Union's position regarding the transfer of what it believed to be bargaining unit work, and the manner in which it was done. Merriss was expressing her view that the work had been taken away in a manner which was secretive and in violation of the collective-bargaining agreement. Thus, the most that can be said of Merriss' use of the phrase "sneaky underhanded and illegal" is that it reflects her understanding of the situation and is tinged with hyperbole. The fact that certain parties viewing the posting may have had their sensibilities offended by it does not render such a posting unprotected: "The Board has long held that legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of Section 7 rights by subjecting employees to investigation and possible discipline on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co*., 332 NLRB 1019, 1020 and fn. 6 (2000)(and cases cited therein), enfd. 263 F.3d 345 (4th Cir. 2001); *Martin Marietta Corp*., 293 NLRB 719, 725 (1989)("[T]he posting of an otherwise protected notice does not lose its protection merely because Respondent finds it distasteful." (Citing *Southwestern Bell Telephone Co*., 276 NLRB 1053 (1985)).

Accordingly, I conclude that the nature of Merriss' posting and related statements were and remained protected by the Act.

E. The Disciplinary Actions Taken against Merriss were Unlawful

1. Merriss' removal from the Weston Contract violated Section 8(a)(1) of the Act.

As has been noted above, the General Counsel contends that the adverse employment actions taken against Merriss were for alleged misconduct in the course of acting as a union official and, as such, are properly analyzed under the framework set forth in *NLRB v. Burnup & Sims*, supra.

The Court there explained that:

> [Section] 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

379 U.S. at 23.

The respondent employer has the burden of showing that it held an honest belief that the discharged employee engaged in misconduct. If the employer meets its burden, the burden then shifts to the General Counsel to show that the employee did not, in fact, engage in the asserted misconduct. *Roadway Express*, 355 NLRB No. 23 slip op. at 1, 8 (2010); *Shamrock Foods Co*., 337 NLRB 915, enfd. 346 F.3d 1130 (D.C. Cir. 2003).

For purposes of analysis pursuant to *Burnup & Sims*, Board precedent establishes a relatively low threshold for an employer to show that it had an honest belief that misconduct has occurred. Although an employer must do more than make a bare assertion of misconduct, some specific evidence linking the employee to particular allegations of misconduct are sufficient. Such an honest belief may be based upon hearsay, and it has been found that an employer need not interview the employee before taking disciplinary action. See *Roadway Express*, supra, slip op. at 19 and cases cited therein. Here, Cappiello and Crouse testified that they reviewed and relied upon the statements provided by Smith and Lustberg and the material posted on the bulletin board on May 3. It is apparent from Crouse's May 14 letter that he was citing Smith and Lustberg's initial allegations of misconduct as well as the contents of the

postings themselves. In this regard, I note that the General Counsel has not contended that for purposes of analysis pursuant to *Burnup & Sims* that Respondent did not have an honest belief that Merriss had engaged in misconduct. Accordingly, I will assume for purposes of analysis under this line of cases that Respondent has shown that it did, in fact, have such an honest belief.

The underlying facts in *Burnup & Sims* are instructive. In that case, two employees of the respondent engaged in organizational activities. Another employee told the plant superintendent that the employees, while soliciting him for membership in the union, stated that the union would use dynamite to get in if the union did not receive the requisite authorizations. The respondent discharged the two employees because of these alleged statements. The Board held that these discharges violated Section 8(a)(1) and (3) of the Act. In doing so, it found that the charges against the organizers were untrue and that they had actually made no threats against the company or its property. The Board further concluded that the respondent's honest belief in the truth of the accusations was not a defense. 137 NLRB 766, 772-773. After the Court of Appeals refused the reinstatement of the organizers, the Court granted certiorari and found that the discharges violated Section 8(a)(1) of the Act.[32]

The parallels to the instant case are apparent. Here, Merriss was engaged in protected conduct and, as a direct result of such conduct, various misconduct allegations were made against her. These have been proven to be false. Moreover, as discussed above, Merriss did not engage in any other activity which would have cost her the protections of the Act and independently warrant discipline. See e.g. *Akal Security, Inc*., 355 NLRB No. 106 (2010), incorporating 354 NLRB No. 11 (2009). Accordingly, under the rationale of *Burnup & Sims*, to the extent Respondent relied upon those allegations of misconduct brought by Lustberg and Smith, Respondent's discipline of Merriss violates Section 8(a)(1) of the Act.

Here, however, the allegations of misconduct at the Hurlbutt parking lot are not the only reasons relied upon by Respondent in supporting its decision to discipline Merriss. As discussed above, Respondent also cites to her posting of photographs and related commentary. As I have found that Merriss' posting was protected, and she did not forfeit the protections of the Act by virtue of her comments, Respondent's decision to discipline her for these reasons also violates Section 8(a)(1) of the Act. See *Phoenix Transit System*, 337 NLRB 510 (2002) enfd. mem 63 Fed.Appx 524 (D.C. Cir. 2003)(employer unlawfully discharged employee for article he wrote in union newspaper concerning employer's handling of employee sexual harassment complaints; citing *Mast Advertising*, 304 NLRB 819, 820 fn. 7 (1991) and cases cited there, the Board found it unnecessary to decide whether the discharge also violated Section 8(a)(3)).

2. Respondent's three-day unpaid suspension of Merriss violated Section 8(a)(1) of the Act.

Although the May 14 disciplinary notice issued to Merriss generally references various allegations of misconduct, during his cross-examination Cappiello specifically tied his decision to issue a three-day suspension of Merriss to her posting on the Union bulletin board on May 3. As Cappiello testified, First Student took the position that Merriss harassed Smith by posting the materials on the bulletin board and that they either were or could have been offensive to Smith;

[32] The Court found it unnecessary to reach the issue of whether the discharges also violated Section 8(a)(3) of the Act, 379 U.S. at 23, and the Board has adopted that line of reasoning, as it would not materially affect the remedy. *Webco Industries*, 327 NLRB 172, 172 fn. 7 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000); *Roadway Express*, 355 NLRB No. 23, slip op. at 8 fn. 32 (2010)

that she therefore "crossed the line" and that this was the reason for her suspension. As I have found that Merriss' posting was protected, and she did not forfeit the protections of the Act by virtue of her comments, Respondent's decision to suspend her for this reason violates Section 8(a)(1) of the Act. See *Phoenix Transit System*, supra; *Mast Advertising*, supra.[33]

3. Respondent's *Wright Line* defense

Respondent has not only argued that Merriss' conduct was unprotected, it further suggests that Merriss was removed from the Weston contract at the direction of its customer as was required under the Revenue Contract. Respondent argues that there is no evidence that it did so because of anti-union animus, and maintains that it is a pro-union company.

Respondent has placed its motivation at issue. Because such claims are so central to its defense to the allegations of the complaint, I will address them. Accordingly, I apply the shifting burden analysis set forth in *Wright Line*, supra. Once the General Counsel has made a prima facie showing that protected conduct was a motivating factor in the employer's action against an employee,[34] the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place "by a preponderance of the evidence." *Wright Line*, supra at 1989; *T. Steele Construction*, 348 NLRB 1173, 1183 (2006).

Respondent has argued that the General Counsel has proved neither protected conduct nor unlawful motivation and therefore has not made out a prima facie case under *Wright Line* Respondent further asserts that even if one were to assume that the elements of a so-called "mixed motive" case are met, that it has met its burden of a valid defense under *Wright Line* principles. Respondent points to the fact that the record contains evidence of numerous instances where drivers were removed at the request of its customers. Accordingly, Respondent argues that First Student would have followed the direction of its customer and removed the driver whether or not protected activity was involved as it was obliged to do under the Revenue Contract and as it has done numerous times in the past several years.

Here, as has been set forth above, the General Counsel has made the requisite showing of concerted, protected and Union activity and Employer knowledge of such activity. Moreover, for the reasons discussed elsewhere in this decision, the evidence is sufficient to demonstrate that Merriss' protected and Union activities were a motivating factor in its decision to discipline her.

Addressing the issue of Respondent's motivation, I find that Respondent cannot lawfully rely upon the Board of Education's allegations of misconduct to justify its decision to discipline Merriss. As has been discussed in detail above, the alleged misconduct relied upon by the

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[33] Neither the General Counsel nor Respondent has advanced any specific argument regarding the May 4 suspension. Based upon the record as a whole, including the complete lack of attention this allegation of the complaint has received from the parties, I decline to find that Respondent violated the Act as alleged in this paragraph of the complaint.

[34] Under the *Wright Line* standards, the General Counsel meets his initial burden by showing (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity and (3) that the activity was a substantial or motivating reason for the employer's action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281(1999).

Respondent to impose discipline against Merriss was insufficient to remove her from the protections of the Act. See e.g. *Atlantic Steel*, supra; *Datwyler Rubber & Plastics*, supra; *Noble Metal Processing, Inc*., supra (April 30); *Valley Hospital Medical Center*, supra; *Emarco*, supra; *Martin Marietta Corp*., supra (May 3). This cannot form a legitimate basis for a *Wright Line* defense.

Moreover, Respondent's failure to conduct a meaningful investigation of the allegations against Merriss, and in particular to afford her an opportunity to rebut these assertions, undercuts Respondent's assertion of any reasonable belief (under *Wright Line* standards, where motive is at issue)[35] that the misconduct had, in fact, occurred. *Midnight Rose Hotel*, 343 NLRB 1003, 1005 (2004) (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct); *McKesson Drug Co*., 337 NLRB 935, 936-937 (2002)(respondent's failure to give employee an opportunity to explain her actions before imposing discipline defeats its claim of reasonable belief that the employee was engaged in misconduct). Respondent's assertion of any "reasonable belief" of misconduct is further undermined by Merriss' admittedly good work record. There is no hint of a suggestion that she previously engaged in any conduct of a similar character. In this regard, I note that Merriss has had a long tenure as a Union officer, and there is no indication that she engaged in inappropriate or explosive behavior in the course of her duties in the past.

This brings me to Respondent's contention, central to its *Wright Line* defense, that it had no choice but to remove Merriss from the Weston route because it was required to do so under the Revenue Contract. Although Merriss' removal might well have been preferred course of action for First Student to take with regard to its customer relations generally, it is unlawful for Respondent to have done so when the request, and its subsequent compliance with that request were predicated upon motives which are proscribed by the Act. Moreover, the evidence fails to meet Respondent's burden to show by a preponderance of the evidence either that it was required to remove Merriss or that it did so notwithstanding her protected conduct.

As an initial matter, I note that, in contrast to other situations of record where the request to remove a driver is clearly set forth in writing, Belair's letter to Cappiello requests an investigation into her conduct, but does not demand Merriss' removal. It is entirely possible that, had Respondent conducted an adequate investigation into the incident in question, it could have rebutted the assertions made by the Board of Education. Clearly, it made the choice not to do so.

Responding to Respondent's assertion of a nondiscriminatory motive, the General Counsel contends that there is no merit to the argument that the adverse employment action taken against Merriss did not violate of the Act because it was taken at the behest of the Board of Education. In support of this contention, General Counsel relies upon *Capitol EMI Music*, 311, NLRB 997, 1000 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), a case involving joint employers, where the Board found that an employer may be held liable for the unlawful discharge of an employee at another employer's direction where the record permits an inference that (1) it knew or should have known that the other employer acted against the employee for unlawful reasons; and (2) that "it acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it." The General Counsel argues that the foregoing analysis is not altered by the fact that the Board of Education is an exempt entity under the Act

[35] As noted above, under *Burnup & Sims*, a respondent is not obliged to independently conduct an investigation of asserted misconduct in support of its assertion of an honest belief. However, as is well settled, under those circumstances, motivation is not at issue.

and is not a joint employer with the Respondent.

General Counsel's reliance on *Capitol EMI* is misplaced, as the Board has subsequently found that that case does not apply to situations where there is no joint employer relationship. *Bowling Transportation, Inc*., 336 NLRB 393, 394, enfd. 352 F.3d 274 (6th Cir. 2003). *Bowling Transportation*, however, is instructive in an analysis of the situation here. There, the named respondent was subcontracted to transport steel for and on the property of AK Steel. AK Steel had instituted a safety bonus program; however, the respondent shared only half of the bonus with its employees. The two alleged discriminatees complained about their employer's practice to an AK Steel manager and expressed the view that the entire safety bonus should be paid to employees. The respondent employer was notified about this discussion.

Subsequently, the employees were removed from the property because it was believed that they were trying to get a union started and because of their discussion with the AK Steel manager. Several days later, the respondent terminated the two employees. Each employee's termination notice described the reason for termination as "not able to function on AK Steel property."

The administrative law judge, affirmed by the Board, found that protected concerted activity and suspected union activity was a motivating factor in both discharges. Applying *Wright Line*, the judge the addressed whether the respondent would have met its burden of showing it would have discharged the employees even in the absence of their protected activity. In this regard, the respondent asserted several reasons relating to deficiencies in the employees' job performance, which were discredited by the judge, as affirmed by the Board.

Of more relevance to the instant case, however, was the fact that the respondent also argued that it would have terminated the employees regardless of their protected concerted activity because AK Steel had barred them from the premises and because the respondent could not employ them productively elsewhere. The judge rejected this argument, finding that the respondent knew that AK Steel barred the employees from the premises because of their protected discussion about the safety bonus. Applying *Capitol EMI*, the judge found that the respondent was required, but failed, to take all measures within its power to resist the unlawful terminations.

Although, as noted above, the Board disagreed with the judge's reliance on *Capitol EMI*, it nevertheless agreed that the respondent had failed to prove an affirmative defense under *Wright Line*. This was so because the respondent knew that the discussion about the safety bonus was the reason the employees had been barred from AK Steel's premises. Although AK Steel was not charged with any unfair labor practices, or alleged as a joint employer, its barring of the employees from its property because of their protected, concerted activity was for an unlawful reason. Thus, the respondent relied upon the action of another employer taken for an unlawful reason as its *Wright Line* defense. As the Board explained, this it cannot do:

> An affirmative defense under *Wright Line* must be based on a lawful, legitimate reason for the challenged employment decision. [Footnote and citations omitted] The Respondent's burden, therefore, is to prove that it would have terminated [the alleged discriminatees] for a lawful, legitimate reason even in the absence of their protected conduct. By definition, the Respondent's reliance on AK's action, which was based on an unlawful reason, cannot satisfy this requirement.

In enforcing the Board's decision, the Sixth Circuit pointedly observed: "To allow subcontractors to mindlessly approve illegal directives is not the intent, purpose or proper effect

of the NLRA, and it sets a dangerous precedent for employers to use the 'just-following-orders' or 'devil-made-me-do-it' defense to unfair labor practices. "

352 F.3d at 284.

Respondent has argued that there is no evidence that its decision to discipline Merriss resulted from anti-union animus, and points to its "Freedom of Association" policy as evidence of its pro-union stance. While Respondent may maintain a neutral policy with regard to unions as an institutional matter, this does not preclude a finding of unlawful motivation in this particular instance. Again, in the *Wright Line* context, I find that Respondent's failure to conduct an adequate investigation of the Board of Education's allegations against Merriss evinces a discriminatory motive. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 984 fn. 40 (2007) ("Enforcement of rules against employees without sufficient prior investigation of their alleged misconduct, including withholding from the accused details of the accusation and denying them an opportunity to explain or deny their alleged misconduct, is evidence of unlawful motive"); *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007)(limited investigation into alleged misconduct without giving employees an opportunity to explain allegations against them supports a conclusion that discharges were discriminatorily motivated); *Diamond Electric Mfg. Corp*., 346 NLRB 857, 862 (2006)(employee "denied the opportunity to provide potentially exculpatory explanations" before discharge). This failure is particularly telling here because, although Cappiello testified, he "would have" asked Crouse to interview Merriss in the course of the investigation, there is no evidence that he, in fact, did make such a request and, moreover, it is undisputed that Crouse failed to do so.[36] Of additional relevance is the undisputed fact that Respondent has subsequently "piled on" a number of misconduct allegations, none of which were either investigated or relied upon at the time the decision was made to discipline Merriss.

With regard to Respondent's contention that it dealt with Merriss consistent with the manner in which other employees have been treated, I note that Merriss' alleged misconduct did not occur during working hours, and did not involve poor driving or inappropriate interactions with students or parents. As outlined above, the evidence adduced in the record, relied upon by Respondent, where it has acceded to a school board request for the removal of a driver have all involved that sort of misconduct.[37]

With regard to the Revenue Contract itself, I find that Respondent has failed to meet its burden to persuade by a preponderance of the evidence that it would have been required to remove Merriss pursuant to its terms. In this regard, Paragraph 28(c) of the revenue agreement contains, among other things, a waiver of liability for a failure to perform a provision or term of the agreement if such failure is caused by an "authority of law." Moreover, there is a provision for the submission of disputes under the agreement to arbitration.

In addition, I note that the Board has recognized that contractual agreements of varying types can be found unenforceable for reasons of public policy. See generally, *Arch of West Virginia*, 338 NLRB 406, 407 fn. 8 (2002) (citing the *Restatement (Second) of the Law of Contracts, Sec. 178*). Respondent has cited no authority for the proposition that its private contractual arrangement with the Board of Education of the Town of Weston for the provision of

[36] Cappiello's subsequent testimony that he did direct Crouse to take a statement but did not review it, even if credible (which it is not), would also go to show a lack of interest in anything Merriss might have to say which would similarly evince a discriminatory motive.

[37] For example, engaging in confrontations with students and/or their parents, unsafe driving, failure to follow assigned routes and failing to stop to pick up students.

transportation services obviates its employees' federally-granted Section 7 rights or privileges it to act in contravention of such rights. In this regard, I note that paragraph 42 the Revenue Contract contains a severability provision which provides that unlawful provisions may be stricken from the agreement without affecting its continuing validity.

Thus, I am not in agreement that the provisions of the Revenue Contract serve to insulate Respondent from liability for violating its employees' Section 7 rights.[38]

In short, under the *Wright Line* defense put forward by Respondent, the evidence falls short of establishing that Respondent had a "lawful" or "legitimate" basis for removing Merriss from the Weston contract. Rather, it is apparent that the Board of Education wanted her off the job because she was engaging in protected activities, and such motivation, which is inconsistent with the protections afforded by Section 7, served as the basis for the actions taken against her by the Respondent. I further note that there is nothing in the Revenue Contract which provided that Respondent was obliged to suspend Merriss for three days without pay, an action which it appears to have undertaken of its own volition, and admittedly because she posted the results of her grievance investigation. Such an action also casts light upon Respondent's motivation generally, and tends to undermine its *Wright Line* defense.

Accordingly, I find that Respondent has not shown that it would have removed Merriss from her assignment to the Weston contract or suspended her notwithstanding her protected, concerted and Union activities and conclude that that Respondent has not met its *Wright Line* burden of showing that such adverse employment actions were not in violation of the Act.

F. Respondent's Waiver Argument

Respondent further argues that the Union has, through its collective-bargaining agreement, waived the right to protest a removal from the jobsite requested by a school, for any reason. Respondent appears to argue that this precludes a finding of an unfair labor practice in this instance. The authority cited by Respondent for this proposition is *NLRB v. Magnavox Co*., 415 U.S. 322 (1974) and *NLRB v. Allis-Chalmers Manufacturing Co*., 388 U.S. 175 (1967). Such authority, however, fails to support Respondent's argument here.

In *Magnavox* the Court affirmed the Board's holding that a labor organization could not waive the right of employees to distribute literature by or on behalf of members of an incumbent union which pertains to (1) the employees' selection or rejection of a labor organization as bargaining representative; (2) other matters related to the exercise by the employees of their Section 7 rights. *Magnavox of Tennessee*, 195 NLRB 265 at 266 (1972). The Court distinguished the line of cases that permit a union to waive the right to strike, on the ground that those cases dealt with "rights in the economic area." [39] It concluded that "a different rule should obtain where the right of the employees to exercise choice of a bargaining representative is involved." 415 U.S. at 325.

Moreover, the Board and the Supreme Court have repeatedly held that "[w]aivers of statutory rights are quite different from situations respecting 'rates of pay, wages, hours… or

[38] In enforcing the Board's order in *Bowling Transportation*, supra, the Sixth Circuit noted that had the discriminatees been members of a protected class under the civil rights laws, the respondent therein would have been obliged to resist discharging them. 352 F.3d at 284.

[39] See e.g. *NLRB v. Allis-Chalmers*, supra, cited by Respondent (union can waive, through bargaining, an employees' right to strike during the term of a collective-bargaining agreement).

other conditions of employment.'" *American Telephone and Telegraph Co*., 250 NLRB 47, 55 (1980) enfd. 644 F.2d 923 (1st Cir. 1981). In such cases there must be a "conscious relinquishment by the union, clearly intended and expressed to give up the right." *Metropolitan Edison Co*. *v. NLRB*, 460 U.S. 693, 708 (1983). Thus the Court and the Board "will not infer from a general contract provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated. More succinctly, the waiver must be 'clear and unmistakable'" Id. "To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp*., 330 NLRB 1363, 1365 (2000). Proof of contractual waiver is an affirmative defense, thus it is Respondent's burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *Allied Signal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied 253 F.3d (2001).

In addition, any such waiver must be consistent with the public policy underlying the statute. See *Douglas v. Argo-Tech Corp*.,113 F.3d 67 (6th Cir. 1997).

Here, for ease of reference, I have reiterated the relevant contractual provisions that Respondent relies upon. In particular, the Revenue Contract provides as follows:

> The conduct of all operators is the responsibility of the CONTRACTOR. The CONTRACTOR shall immediately discipline or discontinue the use of an operator in the performance of this contract when the BOARD, its representatives or agents notifies the CONTRACTOR that an operator's performance is unsatisfactory for any reason. The CONTRACTOR shall immediately suspend an operator from all duties under this Agreement when the Board, its representatives or agents, determines that an operator's performance is unsatisfactory and directs that the operator be suspended for any reason.

In addition, there are two provisions relied upon by Respondent which are set forth in the collective-bargaining agreement:

> The relevant provisions of any revenue contract between the Company and its customers under which an employee of the Company performs work shall be incorporated by reference into this Agreement, to the extent only that such provisions impose terms, conditions or requirements upon the Company and/or its employees that are not otherwise required under the terms of this Agreement. In a situation in which a provision of this Agreement is in conflict with any of the provisions of any such revenue contract, the relevant provisions of said contract should prevail for all purposes. Nothing in this Section shall be construed as subjecting any of the terms of any of the Company's revenue contracts to the Grievance and Arbitration provisions of this Agreement.
>
> and
>
> An employee may be discharged without prior warning for:
>
> A. Receipt by the Company from a contracted customer of a notice to remove an employee from performing service under that contract.

As regards the Revenue Contract, the cited provision, when read in the light of the examples provided by Respondent where it has been enforced, is most obviously understood as a general stipulation relating to the Board of Education's right to seek removal of an employee

when that employee's job performance or related conduct is unsatisfactory or he or she poses a danger to others. The terms of the collective-bargaining agreement, when read in context, acknowledges that right. While Respondent may argue with such an interpretation of these terms, the fact remains that these general contractual provisions fail to show that the Union intended to or agreed to sacrifice employees' Section 7 rights or their right to seek recourse for any violation thereof. Moreover, Respondent has failed to present any other evidence that a forfeiture of employees' rights to engage in union activities or other activities for mutual aid and protection was fully discussed or consciously yielded here.[40] I further note that the enforcement of any such alleged waiver of statutory rights would appear to fly in the face of Respondent's "Freedom of Association" policy and, in particular that provision which states that: "Management shall not act in any way which is or could reasonably be perceived to be anti-union."

Moreover, any alleged waiver of this sort would not be enforceable. The interpretation of the collective-bargaining agreement advanced by Respondent implies that the Union, in negotiating the provisions in question, was empowered to authorize the Respondent to make disciplinary decisions in contravention of the Act, thereby extinguishing employees' Section 7 rights. A union may not negotiate such a waiver. See *Lana Blackwell Trucking, LLC*, 342 NLRB 1059, 1059 fn. 1 (2004)(citing *Magnavox,* supra and *General Motors Co*., 158 NLRB 1723 (1966)).[41]

Additionally, it is well-settled that a union may not waive an employee's right to have charges filed with the Board and that any such a prohibition, as a matter of public policy, would not be binding on the Board:

> It goes without saying that the right of access to the Board's processes for vindication of a statutory violation is fundamental and is to be kept open without roadblocks or hindrance. Neither employer nor union may restrain, coerce or interfere with that right, whether or not it deems the charge meritorious – a question for the Board, not a charged party, to decide.

West Point Pepperell, Inc., 200 NLRB 1031, 1039 (1972) (citing *NLRB v. General Motors Corp*., 16 F.2d 306, 311-312 (1940); See also *American Cyanamid Company*, 239 NLRB 440, 441 (1978)("As has long been recognized, a union can contractually waive employees' right to strike. It does not follow. . .that a union may waive an employee's right under the Act to have his employer's unfair labor practice remedied." (Internal citation omitted.))

Based upon the foregoing I conclude the Union could not, and did not, waive Merriss' statutory Section 7 rights protecting her from discipline or discharge on the basis of her concerted, protected conduct or union activities.

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[40] In this regard I note that the collective-bargaining agreement was adopted, but not negotiated, by the Respondent.

[41] In cases since *Magnavox*, the Board has held that a union may not waive core Section 7 rights of employees. For example, in *Yellow Cab, Inc*., 210 NLRB 568, 569 (1964), the Board specifically found that employees' right to distribute literature in support of collective-bargaining or other mutual aid or protection was not within the power of the union and respondent to take away by virtue of their agreement. Although *Magnavox* and its progeny generally involve the distribution of literature, clearly the conduct that Merriss was disciplined for, which included the posting of materials on a bulletin board which historically has been designated for such a purpose, is equally protected as a means of expression. It would stand to reason that if the Union could not lawfully waive Merriss' statutory right to post such material, it could not waive her right to seek recourse for discipline for doing so.

G. Respondent's "Prevention of Workplace Violence" Rule, While Not Overbroad, was Unlawfully Applied to Merriss.

1. Employees would not reasonably conclude the rule prohibits Section 7 conduct

The General Counsel contends that of the 16 enumerated items in Respondent's "Prevention of Workplace Violence" rule, there are two items described as behaviors that Respondent "will not tolerate" which would reasonably tend to chill employees in the exercise of their Section 7 rights. These are:

- Disparaging or derogatory comments or slurs
- Derogatory or offensive posters, cartoons, drawings or publications.

The analytical framework for assessing whether the maintenance or application of a work rule violates Section 8(a)(1) of the act is set forth in *Crowne Plaza Hotel*, 352 NLRB 382, 383 (2008), quoting from *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Here, there is no contention by the General Counsel that any of the rules alleged to be unlawful either explicitly restrict Section 7 conduct or were promulgated in response to union activity. Rather, the General Counsel argues that the two cited provisions are overbroad and unlawful because they do not specifically define the type of conduct which or provide examples of what actions would constitute violations of those provisions. General Counsel argues that the failure of the cited provisions of the rule to define what is prohibited would reasonably lead employees to the conclusion that protected activities would fall within the ambit of the rule's prohibitions.[42] Respondent, to the contrary, contends that the "Prevention of Workplace Violence" rule is legitimately intended to ensure that employees feel safe in the workplace and that the rule read as a whole is not unlawful on its face because it could not reasonably be construed to prohibit Section 7 activity, was not promulgated in response to Section 7 activity and did not serve as a basis of the discipline issued to Merriss. In this regard Respondent relies

[42] The General Counsel further alleges that this rule was unlawfully applied to Merriss and served as the basis for the adverse employment actions taken against her. *Lutheran Heritage Village-Livonia*, supra; *University Medical Center*, 335 NLRB 1318, 1321 (2001), enf. denied 335 F.3d 1079 (D.C. Cir. 2003); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in rel. part. 916 F.2d 923, 940 (4th Cir. 1990. This contention will be discussed below.

upon *Lutheran Heritage Village*, supra at 647, where the Board held:

> Where, as here, the rule does not refer to Section 7 activities, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even if that reading is unreasonable. We decline to take that approach.[43]

In support of its position, the General Counsel relies, in part, upon *University Medical Center*, 335 NLRB 1318, 1321 (2001) where the Board found that a rule which prohibited employees from engaging in "insubordination . . . or other disrespectful conduct toward a service investigator, service coordinator or other individual" was unlawful. I note however, that on review, in *Community Hospital v. NLRB*, 335 F.3d 1079,1088-1089 (D.C. Cir. 2003), the court, disagreeing with the Board, found that the rule in question applied to "incivility and outright insubordination" and that the Board's suggestion that employees would view such a rule as prohibiting Section 7 conduct was "misplaced." The court added: "In short, to quote the Board itself in a more realistic moment, 'any arguable ambiguity' in the rule arises only through parsing the language of the rule, viewing the phrase. . . in isolation and attributing to the [employer] an intent to interfere with employee rights' *Lafayette Park Hotel*, (internal citation omitted)." 335 F.3d at 1089. While I am, of course, generally obliged to follow Board law, in this instance I note that in *Lutheran Heritage Village*, supra at 647, the Board relied in part upon the court decisions in *Community Hospital* and *Adtranz AFF Daimler Bentz v. NLRB*, 253 F.3d 19, 25-28 (D.C. Cir. 2001), (reversing in pertinent part 331 NLRB 291, 293 (2000)), to conclude in that instance that "a reasonable employee reading these rules would not construe them to prohibit conduct protected by the Act."

The Board has found that a rule's context provides the key to the "reasonableness" of any particular construction. For example, a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity. *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005). The Board held that, in the absence of further guidance from the employer, an employee would reasonably construe the rule to limit his or her Section 7 right to engage in protected protest. On the other hand, the Board has also found that a rule forbidding "statements which are slanderous or detrimental to the company" which appeared on a list of prohibited conduct which included "sexual or racial harassment" and "sabotage" would not reasonably be understood to restrict Section 7 conduct. *Tradesmen International*, 338 NLRB 460, 462 (2002). There, the Board found that "employees would not reasonably believe that the. . . rule applies to statements protected by the Act," because it was listed alongside examples of egregious misconduct. Id.

As was the case in *Tradesmen International*, supra, the General Counsel's challenge to the two cited provisions of the "Prevention of Workplace Violence" rule violates the Board's exhortation against reading phrases in isolation and surgically excising one piece of a policy for close examination void of context. See *Lutheran Heritage Village*, 343 NLRB at 646. While the prohibitions in question, if read in isolation, might reasonably be construed to prohibit the exercise of Section 7 rights, the "Prevention of Workplace Violence" rule as a whole provides sufficient context such that a reasonable employee would not construe the rule as a prohibition on such conduct. As in *Tradesmen International*, supra, the rule in question covers a list of

[43] There, the Board found a rule prohibiting "abusive and profane language," "harassment" and "verbal, mental and physical abuse" to be lawful.

proscribed activities which reasonably would not be construed to implicate Section 7 rights such as: violent behavior, threats of violence, physical or verbal harassment, offensive sexual flirtations or propositions, hitting, striking, pushing, kicking or holding, impeding or blocking the movement of another person, and using or implying the use of weapons, among others. The introductory paragraph to the rule further explains that the purpose of the rule is to insure the "right to expect that his/her workplace is free from intimidating, threatening or dangerous behaviors or practices." [44]

Taken as a whole, therefore, the rule contains sufficient examples and explanations of the purpose for the rule for a reasonable employee to understand that it prohibits the sort of conduct likely to lead to workplace violence or similarly egregious conduct and not Section 7 protected conduct. Accordingly, in disagreement with the General Counsel, I find that the cited provisions of the "Prevention of Workplace Violence" rule, when read in their appropriate context, are not facially overbroad.

2. The "Prevention of Workplace Violence" was unlawfully applied with regard to Merriss' Section 7 conduct

As noted above, even if a rule does not explicitly restrict or would not reasonably be construed to prohibit Section 7 conduct, the rule will have been found to have violated Section 8(a)(1) of the Act if: "the rule has been applied to restrict the exercise of [protected] rights." *Lutheran Heritage Village*, supra at 647. In agreement with the General Counsel, I find that the "Prevention of Workplace Violence" rule was unlawfully applied to discipline Merriss for engaging in Section 7 activity. In particular, in the May 14 notice of disciplinary suspension and removal from contract Crouse stated:

> You then posted the pictures you took on the board along with a letter calling out Ed Smith for working for the BOE. Your behavior was inappropriate, disrespectful and abusive to the customer and to another FS employee. In the Employee Handbook beginning on page 38, this behavior is explicitly spelled out and it is also very clear that it will not be tolerated from any employee.

Crouse went on to warn Merriss that:

> Any future incidents of disrespectful, abusive language or treatment of any kind towards any First Student employee or one of its customers and any violation of any First Student policy, at any time in the future, will result in your immediate termination, without recourse or eligibility for rehire. . . .

I note that Crouse was not questioned and offered no testimony regarding the contents of this letter. While Respondent has generally denied that the "Prevention of Workplace Violence" rule formed a basis for the discipline issued to Merriss, it has adduced no testimony or

[44] In *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989), enfd. 916 F.2d 932 (4th Cir. 1990), also relied upon by the General Counsel, the hospital maintained a rule which prohibited "malicious gossip or derogatory attacks on fellow employee, patients, physicians or hospital representatives." While the Board found that a prohibition on malicious gossip was lawful, it concluded that the prohibition on derogatory attacks on employees. . . or hospital representatives was a violation of Section 8(a)(1). While this case, on its face, tends to support the General Counsel's position that the rules cited herein are overbroad, the Board's subsequent decisions beginning with *Lutheran Heritage Village*, supra, require that I view the cited provisions of the Respondent's rule in their overall context and I find in this instance, the context is such that an employee would not view the rule as prohibiting Section 7 conduct.

other evidence to show this to be the case and, more importantly, has cited no other provision of its National Employee Handbook to which Crouse may have been referring in the May 14 letter.[45] To the contrary, based upon the record as a whole, I find that Crouse's invocations of First Student policy (beginning on page 38 of its Employee Handbook) in the context of Merriss' posting of pictures and a letter "calling out" Smith for working for the Board of Education are apparent references to its "Prevention of Workplace Violence" rule and in particular those provisions cited by the General Counsel which prohibit the posting of derogatory or offensive posters, cartoons, drawings or publications.[46] I further find that Crouse's May 14 letter constitutes an admission that Respondent was relying, at least in part, upon this rule in issuing adverse employment actions to Merriss. Moreover, I find that those actions found to be offensive by Respondent were those protected by the Act, i.e.: Merriss' grievance investigation which including photographing Smith and Lustberg and the subsequent dissemination of information on the Union bulletin board to coworkers about work assignments and potential grievances. Consequently the rule at issue was utilized as, at the least, a partial basis to discipline Merriss for her protected conduct. Thus, the application of the rule in this instance tends to chill employees in the exercise of their Section 7 rights in violation of Section 8(a)(1).

Accordingly, I find that by applying its "Prevention of Workplace" rule to discipline Merriss for her protected concerted and union activities, Respondent violated Section 8(a)(1) of the Act.

Conclusions of Law

1. By suspending and discharging Janet Merriss because of her concerted, protected and union activities, Respondent has engaged in unfair labor within the meaning of Section 8(a)(1) of the Act.

2. By enforcing the "Prevention of Workplace Violence" rule as set forth in its National Employee Handbook to suspend and discharge Merriss because of the concerted, protected and union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having enforced its "Prevention of Workplace Violence" rule to discipline Merriss for her concerted, protected and union activities, Respondent must cease maintaining and giving effect

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[45] I further infer from Respondent's failure to question Crouse on this matter that, had Counsel done so and Crouse would have testified truthfully regarding this issue, such testimony would have been adverse to Respondent's interests. *Parksite Group*, supra; *Advocate South Suburban Hospital v. NLRB*, supra; *Martin Luther King, Sr. Nursing Center*, supra.

[46] The section of the National Employee Handbook dealing with "Company Rules and Personal Conduct, where the "Prevention of Workplace Violence" rule appears, is found on page 38. The challenged provisions of the rule appear on page 40.

to the rule in this manner. Having discriminatorily discharged Merriss based upon its discriminatory enforcement of its "Prevention of Workplace Violence" rule and because of her concerted, protected and Union activities, the Respondent must offer her reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position.[47] Respondent must also make Merriss whole for any loss of earnings or other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to remove from its files all references to the unlawful suspension and discharge of Merriss and notify her in writing that this has been done and that the suspension and discharge will not be used against her.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[48]

ORDER

The Respondent, First Student, Inc., Weston, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing its "Prevention of Workplace Violence" rule as set forth in its National Employee Handbook in a manner which interferes with, restrains or coerces employees in the exercise of rights guaranteed to them by Section 7 of the Act.

(b) Suspending, discharging or otherwise discriminating against employees because they engage in concerted protected or union activities.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Janet Merriss full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Janet Merriss whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

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[47] Once the Respondent has taken steps to comply with this recommended remedy and related Order, any issues as to the adequacy of the actions it has taken are properly left to the compliance stage of this proceeding, see *Bowling Transportation, Inc*., supra at 395, fn. 13, as is the issue of whether Respondent's subsequent offers of employment to Merriss serve to mitigate its backpay liability.

[48] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter, notify Merriss in writing that this has been done and that the suspension and discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Weston, Connecticut copies of the attached notice marked "Appendix."[49] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 14, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 4, 2011.

_____
Mindy E. Landow
Administrative Law Judge

[49] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain or enforce our "Prevention of Workplace Violence" rule as set forth in our National Employee Handbook in a manner which interferes with, restrains or coerces you in the exercise of the rights described above.

WE WILL NOT suspend, discharge or otherwise discriminate against you because you engage in concerted protected or union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Janet Merriss full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Janet Merriss whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Janet Merriss, and within 3 days thereafter, notify Merriss in writing that this has been done and that the suspension and discharge will not be used against her in any way.

FIRST STUDENT, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

280 Trumbull Street, 21st Floor
Hartford, Connecticut 06103-3503
Hours: 8:30 a.m. to 5 p.m.
860-240-3522.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3528.